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No. ___

IN THE

Supreme Court of the United States

HOWARD MCDOUGALL, Estate of ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH AND RONALD J. KUBALANZA,

Petitioners,

v.

C.C. MID WEST, INC.

Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

STEPHEN WASINGER *
STEPHEN F. WASINGER PLC
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, MI 48226
(248) 414-9900

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether Section 514(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1144(a), preempts a third-party's state law causes of action against fiduciaries of an employee benefits plan, where the basis of the claim arises from communications made by the fiduciaries to plan participants concerning the participants' rights under the terms of the employee benefit plan, even if a third-party contends that the fiduciaries acted with an improper motivation or made an erroneous decision for an improper purpose?

2. Whether a state court may nullify the effect of ERISA preemption by conducting a "threshold" preemption inquiry concerning whether ERISA plan participants were eligible for certain plan benefits, whether plan fiduciaries had a duty to communicate with participants concerning plan benefits, and other matters of plan administration and interpretation that are subject to exclusive federal regulation under ERISA?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners Howard McDougall, Arthur H. Bunte, Jr., R.V. Pulliam, Sr., Joe Orrie, Jerry Younger, George J. Westley, and Ray Cash are individuals who were Trustees and fiduciaries of the Central States, Southeast and Southwest Areas Pension Fund. The Estate of Robert J. Baker is the estate of the late Robert J. Baker, who was a Trustee and fiduciary of the Central States, Southeast and Southwest Areas Pension Fund. Ronald J. Kubalanza is an individual who was the Executive Director and a fiduciary of the Central States, Southeast and Southwest Areas Pension Fund.

Respondent

C.C. Mid West, Inc., is a Michigan corporation.

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OPINIONS BELOW

The November 22, 2004 Order denying reconsideration entered by the Michigan Supreme Court is unreported as is set forth in Appendix A hereto (App. A at 1a).

The June 17, 2004 Order entered by the Michigan Supreme Court is unreported and is set forth in Appendix B hereto (App. B at 3a).

The January 17, 2003 Opinion entered by the Michigan Court of Appeals is unreported and is set forth in Appendix C hereto (App. C at 5a).

The July 22, 2002 Order entered by the Michigan Supreme Court is unreported and is set forth in Appendix D hereto (App. D at 15a).

The June 22, 2001 Opinion entered by the Michigan Court of Appeals is unreported and is set forth in Appendix E hereto (App. E at 17a).

The May 8, 1998 Opinion entered by the Oakland County, Michigan Circuit Court is unreported and is set forth in Appendix F hereto (App. F at 26a).

The January 14, 1998 Opinion and Order of the United States District Court for the Eastern District of Michigan is reported at 990 F. Supp. 914 (E.D. Mich. 1998), and is set forth in Appendix G hereto (App. G at 47a).

BASIS FOR JURISDICTION

On June 17, 2004, the Michigan Supreme Court entered the order for which Petitioners seek review. On November 22, 2004, the Michigan Supreme Court denied reconsideration of the June 17, 2004 order with one Justice dissenting. This petition for writ of certiorari is filed within 90 days from the date of the entry of the November 22, 2004 order denying reconsideration. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 514(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1144(a), provides:

> **(a) Supersedure; Effective Date.**–Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee

benefit plan described in §4(a) and not exempt under §4(b). This section shall take effect on January 1, 1975.

Section 514(c)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1144(c)(1), provides:

(c) Definitions.–For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

STATEMENT OF THE CASE

The Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a not-for-profit "employee benefit plan" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1002(3). Central States was established in accordance with Section 302 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186, and Sections 402 and 403 of ERISA, 29 U.S.C. §§ 1102 and 1103. Petitioners Howard McDougall, Arthur H. Bunte, Jr., R.V. Pulliam, Sr., Joe Orrie, Jerry Younger, George J. Westley, and Ray Cash were trustees and fiduciaries of Central States during the time period in question. Petitioner Estate of Robert J. Baker was substituted for the late Robert J. Baker, who was a trustee and fiduciary of Central States during the time period in question. Petitioner Ronald J. Kubalanza was the Executive Director and a fiduciary of Central States during the time period in question. During the period in question, Central States was governed by a board of eight trustees, four appointed by employers and four appointed by unions representing employees of participating employers, as expressly authorized by Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5).

The Complaint filed by Respondent C.C. Mid West, Inc ("C.C. Mid West") alleges the following facts: C.C. Mid West is a trucking operation and a wholly-owned subsidiary of CenTra, Inc. ("CenTra"). (Complaint, ¶ 8.) CenTra formerly owned Central Transport, Inc. ("Central Transport")—a company which participated in Central States until its shutdown in March 1997, and which was at least at one time (like C.C. Midwest) a subsidiary of CenTra. (Complaint, ¶ 8-9.) Approximately 235 former employees of Central Transport are participants in Central States. (Complaint, ¶ 10.) After Central Transport terminated the employment of these participants, Central States permitted the former employees to make self-contributions to Central States for a period of up to five years. (Complaint, ¶ 16.) After Central Transport ceased operations, C.C. Mid West contacted some of Central Transport's former employees and "offered to negotiate and ultimately enter into independent contractor agreements" with them. (Complaint, ¶ 19.) C.C. Mid West actually entered into employment agreements with 59 former Central Transport employees. (Complaint, ¶ 20.)

In April 1997, representatives of Central States met with the former Central Transport employees in Fort Wayne, Indiana to describe how employment by C.C. Mid West would affect their rights under Central States' plan. (Complaint, ¶ 24.) On May 7, 1997, Central States wrote the participants, who were former Central Transport employees, to advise them about certain determinations which Central States had taken with respect to their benefits and to encourage them to speak to a Central States representative to "determine how this will affect your benefit status. . . .") (Complaint, ¶ 25.) The May 7, 1997 letter also stated:

> The Trustees also agreed to permit those participants who are on lay-off status as a result of Central Transport, Inc.'s shut-down to continue to make pension self-payments for a period of up to five (5) years provided that self-contributions will not be accepted for any

> period during which a participant is performing work for any company affiliated with either U.S. Truck Company, Inc. or CenTra, Inc.

(Complaint, Ex. A.)

Based upon these allegations, C.C. Mid West (which is alleged to be an affiliate of CenTra) challenged the fiduciaries' "refusal to accept self-contributions from owner-operators." (Complaint, ¶ 30.) C.C. Mid West goes on to allege that "Defendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund." (Complaint, ¶ 39.) The Complaint contains three counts. Count I alleges that the trustees' communications constitute "tortious interference with contractual relations." Count II alleges that the trustees' communications constitute "tortious interference with business expectancies." Count III seeks exemplary damages.

The thrust of these allegations is that the Defendant plan fiduciaries tortiously interfered with C.C. Midwest's interest in hiring the employees layed off by Central Transport when the fiduciaries communicated their benefit determination that the layed off employees/plan participants would not be eligible under the plan to make pension self-contributions if they returned to active employment with another affiliate of CenTra (*e.g.*, C.C. Midwest).

After the Complaint was filed, Defendants sought to remove the case from the Oakland County Circuit Court to the United States District Court for the Eastern District of Michigan arguing that the state law claims were completely preempted by ERISA. The district court ordered the case remanded to state court because the "complaint asserts solely state law claims, and Plaintiff would be unable to bring a civil enforcement action under § 1132(a) because Plaintiff is not a party authorized to do so under that section." *C.C. Mid West, Inc. v. McDougall*, 990 F. Supp. 914, 924 (E.D. Mich. 1998) (App. G at 68a.).

After the case was remanded to state court, the circuit court granted the Defendants' motion for summary disposition holding that ERISA preempted C.C. Mid West's state law claims. (App. F at 45a.) On appeal, the Michigan Court of Appeals affirmed the circuit court. Relying on the allegations in the Complaint, including the ERISA fiduciaries' May 7, 1997, letter which was attached to the Complaint, the court of appeals held that C.C. Midwest failed to state a claim for tortious interference because Defendants were motivated, at least in part, by legitimate business reasons. (App. E at 23a-25a.) Further, the court of appeals recognized that Defendants were acting under legally mandated obligations to inform their participants of their rights under the ERISA plan, but did not explicitly hold that C.C. Midwest's claims were preempted. (App. E at 23a-25a.) On July 22, 2002, the Michigan Supreme Court vacated the decision, and remanded the case so that the court of appeals could decide the preemption issue. (App. D at 15a-16a.)

On remand, the court of appeals held that C.C. Mid West's claims were preempted by ERISA and again affirmed the circuit court's dismissal of C.C. Mid West's claim. (App. C at 11a-14a.) The court of appeals explained the basis for its conclusion:

> defendants, as fiduciaries of the Pension Fund had a statutory obligation under ERISA to inform plan participants of matters that could affect their interest under the Plan.
>
> . . .
>
> As we did in our first opinion, we again conclude that defendants' actions were undertaken as fiduciaries of the Pension Fund. By law, defendants had a duty to inform the plan participants of their rights under the plan and how those rights may be affected by certain employment contracts. The meeting held with and the letter sent to the plan participants by defendants informed the plan

> participants to contact the Pension Fund's toll free number in order to find out how their decisions may impact benefits. The trial court did not err by concluding that even if the administration of the fund was malicious as alleged by plaintiff, the manner in which the Pension Fund was administered is a critical factor in plaintiff's claims and thus plaintiff's claims are subject to preemption.

(App. C at 11a-12a (citations omitted).)

The case returned yet again to the Michigan Supreme Court which yet again vacated and remanded the decision of the court of appeals. Although the court disclaimed an intention to be "endorsing a particular definition of 'relate[s] to' for the purpose of preemption under [ERISA]," the court explained that a remand for further factual development was necessary because:

> it is not apparent from the pleadings, depositions, admissions, and documentary evidence whether the plan administrators had any duty to communicate information to the former employees because it is impossible to determine from the available information whether the former employees remained eligible to self-contribute at the time the challenged communications were made.

(App. B at 3a-4a.) After this Court issued its decision in *Aetna Health, Inc. v. Davila*, __ U.S. __, 124 S. Ct. 2488 (2004), Defendants moved for reconsideration before the Michigan Supreme Court. Over one dissent, the Michigan Supreme Court denied reconsideration. (App. A at 1a.)

REASONS FOR GRANTING THE WRIT

This case presents a frontal attack on ERISA preemption by requiring ERISA fiduciaries to justify, in state court, that they acted for a proper ERISA purpose when they made benefit determinations and communicated those benefit determinations to ERISA plan participants. As such, the decision

of the Michigan Supreme Court necessarily subjects the ERISA fiduciaries to state law determinations in direct contradiction to Congress' intention when it passed ERISA.

As this Court has repeatedly held, Congress intended that plans and fiduciaries be governed by a uniform federal administrative scheme to avoid the risk that state law might impose new and different standards on ERISA plans and fiduciaries. *Aetna Health, Inc. v. Davila*, __ U.S. __, 124 S. Ct. 2488, 2495 (2004); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10-11(1987) (unpredictable litigation burdens may well cause "employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them"). In this case, the Michigan Supreme Court has held that the determination of whether a claim is preempted may turn on "whether the former employees remained eligible to self-contribute at the time the challenged communications were made." (App. B at 4a.) In other words, according to the Michigan Supreme Court, a claim may not be preempted because the communication (and implicitly the underlying benefit determination) was incorrect under the terms of the plan. However, the very nature of the inquiry demonstrates that the resolution of the claim is dependent upon both the interpretation of the terms of the plan and the administration of the plan. No matter how the Michigan Supreme Court might attempt to recast the inquiry, the Michigan Supreme Court was forcing ERISA fiduciaries to defend themselves and their fiduciary determinations in a state court under state law.

The issue of "eligibility" for benefits which the Michigan Supreme Court identified as a threshold question in the preemption analysis in itself requires an interpretation of the plan, and improperly embroils state law in core matters of ERISA plan administration. (App. B at 4a.) Similarly, under the guise of preliminary "factual development," the Michigan Supreme Court has directed the state courts to determine the

extent to which the Defendant plan fiduciaries "had a duty to communicate" with the plan participants concerning the pension benefit determination that is at the heart of this case. (App. B at 4a.) Clearly, a determination concerning the scope of a fiduciary's duty to communicate with plan participants concerning benefits can only be made under ERISA, and cannot be resolved under state law. While the Michigan Supreme Court claimed that it was not resolving the ultimate issue preemption issue—whether C.C. Mid West's claim "relates to" an ERISA plan (App. B at 4a)—in fact the preemption analysis which the Michigan Court articulated invites state law resolution of key issues of plan interpretation and administration.

The Michigan Supreme Court's ruling also improperly imposes the burden of "factual development" in a state court proceeding upon ERISA plans. The Michigan Supreme Court's ruling will subject ERISA plans to discovery and other procedural hurdles in state courts even in cases—like this one—in which the pleadings themselves make clear that the basis of the claim is a benefit plan interpretation by plan fiduciaries and the communication of that interpretation to plan participants. This is a burden imposed upon ERISA plans under state law that runs clearly contrary to the intent of the ERISA preemption provision.

As discussed in detail below, this decision conflicts with this Court's decisions, in particular its decision in *Aetna Health*. Further, the decision conflicts with decisions of various courts of appeals, including the Fifth Circuit in *Mayeaux v. Louisiana Health Serv. & Indemnity Co.*, 376 F.3d 420 (5th Cir. 2004), and the Eleventh Circuit in *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186 (11th Cir. 1997) (per curiam), which both held that state law claims such as the claims raised by C.C. Mid West in this case are

preempted by ERISA precisely *because* they require an inquiry into benefit decisions and communications made by plan administrators.

This case warrants the Court's review because the Michigan Supreme Court's decision will subject employee benefit plans and their fiduciaries to varying standards depending upon the vagaries of state law, subject them to liability and damages not authorized by ERISA based upon a showing that a benefit determination or communication was erroneous, and, at a minimum, expose them to increased litigation burdens due to having to defend such claims.

1. A State Law Cause of Action Is Preempted by ERISA Where the Cause of Action "Relates To" an ERISA Plan by Requiring an Examination of the Terms of the Plan.

A state law may "relate to" an employee benefit plan and thereby be preempted, even if the law is not specifically designed to affect such plans, and even if the effect is indirect. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129-30 (1992). A state-law cause of action relating directly to the operation of an ERISA employee benefit plan is preempted even if it arises under a law of general application that has no connection to employee benefit plans. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218-19 (5th Cir. 1992). To determine whether there is preemption, a court must consider whether "the underlying conduct" that forms the basis of the claim could "be divorced from its connection to the employee benefit plan." *Id.* at 1220. A claim that has such a connection to an employee benefit plan is preempted even if ERISA does not provide a remedy. *E.g. Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1274-75 (10th Cir. 1996).

This Court's decision in *Aetna Health* is instructive because it reversed a court of appeals decision which, like the

decision of the Michigan Supreme Court, concluded that issues about fiduciary responsibility could be determined *as a matter of fact*. The court of appeals in *Aetna Health* concluded that the decisions for which the petitioners in that case were being sued were "mixed eligibility and treatment decisions" and hence were not fiduciary in nature. *Aetna Health*, 124 S. Ct. at 2494. The court of appeals next determined that respondents' claims did not fall within ERISA because the plaintiffs "assert tort claims," while Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), "creates a cause of action for breach of contract," and also the *Aetna Health* plaintiffs "are not seeking reimbursement for benefits denied them," but rather request "tort damages" arising from "an external, statutorily imposed duty of 'ordinary care.'" *Id.* The court of appeals also concluded that ERISA preemption is limited to situations in which "State . . . duplicate the causes of action listed in ERISA § 502(a) [29 U.S.C. § 1132(a)] . . . ." *Id.*

This Court rejected that reasoning. In doing so, the Court observed that an essential part of the *Aetna Health* plaintiffs' claims, like C.C. Mid West's claims in this case, required interpretation of the terms of an ERISA benefit plan, and, therefore, the state law liability would exist only because of the *Aetna Health* defendants' administration of ERISA-regulated benefit plans. As stated by the Court: "Petitioners' potential liability under the THCLA in these cases, then, derives entirely from the particular rights and obligations established by the benefit plans." *Id.* at 2498.

In this case, it is impossible to divorce C.C. Mid West's claim from its connection with Central States' plan. The core allegations of the Complaint, as evidenced by the May 7, 1997 letter which C.C. Mid West attached to the Complaint, revolve around the Trustees' alleged abuse of their fiduciary positions in order to penalize C.C. Mid West. And, as the Michigan Supreme Court's order makes clear, determining

the merits of C.C. Mid West's Complaint necessarily requires an examination of the ERISA plan provisions in order to determine whether the Trustees complied with those provisions when they communicated with plan participants about the right to make self-contributions to Central States if they went to work for C.C. Mid West.

Because the Michigan Supreme Court's order requires an examination of Central States' plan to determine whether "the former employees remained eligible to self contribute at the time the challenged communications were made," the order mandates an inquiry which ERISA bars. If a state court must look to the plan to determine whether an action is permissible, then necessarily the state law claim "relates to" an ERISA plan and it is preempted because the ERISA plan is a "critical factor" in determining the existence of a state law remedy. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-40 (1990). C.C. Mid West cannot avoid this necessary conclusion by stating that it is not seeking benefits or invoking ERISA rights. C.C. Mid West's fundamental claim challenges a benefit determination made by the Trustees, namely the decision communicated in the May 7, 1997 letter that participants would not be allowed to make "pension self-payments" if they worked for C.C. Mid West or other companies affiliated with CenTra.

2. A State Law Cause of Action That Requires an Examination of the Correctness of a Determination or Communication Made by the Plan Is Preempted by ERISA because the Correctness of the Determination or Communication Does Not Change the Fact that the Determination or Communication "Relates To" the Plan.

The Michigan Supreme Court's order erroneously ties the question of the "duty to communicate information" to a determination whether "the former employees remained elig-

ible to self-contribute at the time the challenged communications were made." (App. B at 4a.) Said another way, the order necessarily means that ERISA preemption applies only when the fiduciaries make correct determinations, but does not apply when the fiduciaries make incorrect determinations. However, this Court's precedents establish that the correctness of the determination does not affect whether it is "related to" a plan.

Aetna Health reiterates that the fiduciary's duty to communicate with participants and to determine whether benefits are awarded arises under ERISA, not state law. ERISA itself defines what constitutes a "fiduciary" and, therefore, what constitutes a fiduciary duty:

> ERISA defines a fiduciary as any person "to the extent . . . he has any discretionary authority or discretionary responsibility in the administration of [an employee benefit] plan." § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii). When administering employee benefit plans, HMOs must make discretionary decisions regarding eligibility for plan benefits, and, in this regard, must be treated as plan fiduciaries.

124 S. Ct. at 2501-02. ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), expressly mandates that a plan fiduciary "shall discharge his duties with respect to a plan *solely in the interest of the participants and beneficiaries* and . . . for the *exclusive purpose of providing benefits to participants and their beneficiaries* . . ." (emphasis added). Although the statute articulates a number of fiduciary duties, it is not exhaustive. Rather, Congress relied upon the common law of trusts to "define the general scope of [fiduciary] authority and responsibility." *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985). Fiduciary duty includes the common law duty of loyalty, which requires fiduciaries to deal fairly and honestly with beneficiaries. *Varity Corp. v. Howe*, 516 U.S. 489, 508

(1996). Thus, the Court had no trouble concluding in *Aetna Health* that "a benefit determination is part and parcel of the ordinary fiduciary responsibilities connected to the administration of the plan." 124 S. Ct. at 2501. Therefore, if, as C.C. Mid West alleges, the Trustees acted selfishly with the intention of harming C.C. Mid West (rather than in the interests of the plan participants), then the Trustees violated their duties under ERISA. This is true regardless of whether the Trustees wrongfully denied benefits or fraudulently communicated about the availability of benefits.

In *Varity*, an employer distributed materials and held a meeting in which it convinced some 1,500 employees to voluntarily transfer to a new subsidiary by intentionally misrepresenting the subsidiary's financial viability and the future security of the participants' benefits, should they accept the transfer. *Id.* at 492-94. In reviewing this claim, this Court stated that "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose." *Id.* at 502. Thus, the Court concluded:

> To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA [29 U.S.C. § 1104(a)(1)]."

Id. at 506 (citations omitted).

In this case, there is no dispute that the Trustees had authority to communicate as fiduciaries with plan beneficiaries. Also, there is no dispute that the Trustees did communicate about benefits—whether truthfully or falsely.

Thus, in order to resolve the allegations in the Complaint, the Trustees' actions must be analyzed to determine whether they conform to the standards imposed by ERISA. However, since such an inquiry "relates to" the plan, the state law cause of action is preempted by ERISA. To hold otherwise would allow a state law remedy that would conflict and/or supplement the causes of action provided by ERISA, the precise result that ERISA preemption is designed to avoid. *See Aetna Health*, 124 S. Ct. at 1295 ("any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted").

3. A State Law Claim Based Upon a Determination or Communication Regarding Benefits Under the Terms of an ERISA Plan Is Preempted Even if the Claim Is Not Made by a Participant or Beneficiary.

This Court has held that state law claims based upon the improper processing of benefits, such as for tortious breach of contract, "undoubtedly meet the criteria for pre-emption under § 514(a) [29 U.S.C. § 1144(a)]." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987). Based upon *Pilot Life*, numerous courts of appeals have concluded that state law claims for tortious inference with contract are preempted when the claim involves the proper administration of the plan. *E.g., Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187-88 (11th Cir. 1997) (per curiam); *Kuhl v. Lincoln Nat'l Health Plan*, 999 F.2d 298, 302 (8th Cir. 1993); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 819 (9th Cir. 1992); *Tomczyk v. Blue Cross & Blue Shield United*, 951 F.2d 771, 776-77 (7th Cir. 1991).

This result does not change even if the party asserting the claim is neither a participant nor a beneficiary. For example, in *Garren*, the plaintiff argued that his claim for tortious

interference with contract was not preempted by ERISA because the defendant insurance company was not the plan administrator. 114 F.3d at 188. In rejecting this argument, the Eleventh Circuit held that "[t]he proper focus is not on the relationship between the parties but on the relationship between the alleged conduct and the refusal to pay benefits." *Id.* As in *Garren*, the claims made by C.C. Mid West relate to the administration of the plan and are thus preempted regardless of whether C.C. Mid West has any remedy under ERISA.

The Fifth Circuit's decision in *Mayeaux v. Louisiana Health Serv. & Indemnity Co.*, 376 F.3d 420 (5th Cir. 2004), demonstrates that it is the relationship between the claim and the administration of the plan, not the identity of the plaintiff, that controls. In *Mayeaux*, one of the plaintiffs was the participant's doctor. He asserted various state law claims including intentional interference with contracts, arising from the denial of the participant's benefit claim. In affirming the district court's judgment in favor of the plan on preemption grounds, the court held:

> Dr. Hyman's state law claims for interference with contract and defamation also fail the conflict preemption test. To allow a medical practitioner to sue for defamation and intentional interference when an ERISA plan administrator decides that the plan does not cover a particular medical treatment for a particular participant or beneficiary would undoubtedly jeopardize the relationships among the traditional ERISA entities of which the treating physician is not one. These are the sort of claims that go to the very heart of the ERISA administration process. We further agree with the district court that "[e]ven though these claims are labeled by Plaintiffs as state law, the claims arose from the manner in which [BCBS] determined not to cover Hyman's high dosage antibiotic treatments and the subsequent notification to patients that HDAT would not be covered under the Adler Plan." Thus, we have no difficulty

> holding that "the existence of an [ERISA] plan is a critical factor is establishing liability" for the state law causes of action asserted by Dr. Hyman. We conclude that, as such, they are conflict preempted.

Id. at 433 (footnotes omitted).

Here, the relationship between Central States and its participants, and the ability of the trustees to administer the plan, would be adversely affected if "tortious interference" state law claims such as those asserted by C.C. Mid West are allowed to proceed. C.C. Mid West's claims would necessarily require an examination of the way in which the Plan was administered and thus thwarted the fundamental policies embodied in ERISA's preemption provision. Taken to the logical conclusion, if C.C. Mid West were allowed to bring its state law claims and prevail, the Plan would be required to either change its benefit determinations or be penalized for not changing them. Nothing could relate more to or be connected with an ERISA plan as basic benefit determinations. In essence, C.C. Mid West is attempting to mandate benefits, in the form of allowing them to self-contribute, for those Plan participants C.C. Mid West hired or intends to hire.

The Michigan Supreme Court's Order in this case purported to take no position concerning whether C.C. Mid West's claims "relate to" an ERISA plan, but the "factual development" which it mandated on remand of this case necessarily entails state law scrutiny concerning core matters of ERISA plan administration. (App. B at 4a.) That is, the Michigan Supreme Court has instructed the state courts to *interpret* the ERISA plan at issue in this case in order to determine whether the plan participants were "eligible" for the pension benefits in question, and to determine whether the fiduciaries had a "duty to communicate" to the participants concerning these benefits. (App. B at 4a.) Although the Michigan Supreme Court has attempted to cast these issues as "threshold" matters in the preemption analysis (App. B at 4a), in

fact the inquiry directed by the Michigan Supreme Court necessarily will draw state law into issues of benefit plan administration that are the exclusive province of federal law.

Moreover, the Michigan Supreme Court's ruling in this case threatens to needlessly burden ERISA plans and plan fiduciaries with discovery and "factual development" concerning matters of plan administration under the guise that such inquiries are necessary as a part of the preemption analysis. (App. B at 4a.) In this case, C.C. Mid West's pleadings leave no doubt that its claim is based upon a benefit determination made by plan fiduciaries and communicated to plan participants. Given the allegations of the Complaint, it is impossible to state or imagine any "factual development" which could possibly demonstrate that this case is anything other than a direct challenge under state law to a benefit determination made by ERISA plan fiduciaries.

Under these circumstances, to subject plan fiduciaries to the burden of discovery and further "factual development" in a state law proceeding would run counter to the fundamental ERISA preemption principle that matters of plan administration cannot be regulated under state law.

In sum, the decision of the Michigan Supreme Court conflicts with both this Court's decisions, most notably the *Aetna Health* decision, and with the decisions of numerous courts of appeals including the Fifth Circuit in *Mayeaux* and the Eleventh Circuit in *Garren*. Since the claims made by C.C. Mid West require inquiry into whether the determinations and communications made by the Trustees in administering the plan were correct, these claims are preempted by ERISA. To hold otherwise will expose employee benefit plans and their fiduciaries to liability under conflicting state law standards and will subject them to costly and burdensome litigation, precisely the result that ERISA § 514(a) was enacted to prevent.

CONCLUSION

For the reasons stated, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

STEPHEN WASINGER *
STEPHEN F. WASINGER PLC
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, MI 48226
(248) 414-9900

* Counsel of Record

Counsel for Petitioners

APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[Filed November 22, 2004]

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 123237
COA: 213386
Oakland CC: 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

On order of the Court, the motion for reconsideration of this Court's order of June 17, 2004 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

KELLY, J., would grant reconsideration.

[Logo]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 22, 2004

/s/ Corbin R. Davis
CORBIN R. DAVIS
Clerk

APPENDIX B

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[Filed June 17, 2004]

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 123237
COA: 213386
Oakland CC: 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we VACATE the January 17, 2003 judgment of the Court of Appeals and REMAND this case to the Oakland Circuit Court for further development of the factual record through discovery or, if appropriate, for

amendment of the pleadings. In considering a motion challenging jurisdiction under MCR 2.116(C)(4), a court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate that the court lacks subject matter jurisdiction. MCR 2.116(G)(5). While defendants' statements about self-contribution may, in the abstract, be related to their pension fund duties, further factual development may show that they were not. While we are not by this order endorsing a particular definition of "relate[s] to" for the purpose of preemption under the Employee Retirement Income Security Act (ERISA), 29 USC § 1001 *et seq*, we believe further factual development will assist the circuit court in this matter. We therefore remand for further factual development. For instance, it is not apparent from the pleadings, depositions, admissions and documentary evidence whether the plan administrators had any duty to communicate information to the former employees because it is impossible to determine from the available information whether the former employees remained eligible to self-contribute at the time the challenged communications were made. This may be a threshold issue bearing on whether the fiduciaries activities were protected under ERISA's preemption provisions. *See, e.g., Mackey v Lanier Collection Agency & Service, Inc.*, 486 US 825 (1988).

We do not retain jurisdiction.

[Logo]

I. CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 17, 2004

/s/ Corbin R. Davis
CORBIN R. DAVIS
Clerk

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

[Filed January 17, 2003]

No. 213386
Oakland Circuit Court
LC No. 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

ON REMAND

Before: Bandstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

The instant matter is before this Court on remand from the Michigan Supreme Court on rehearing granted in lieu of granting leave to appeal. The Supreme Court vacated the prior decision of this Court which affirmed the trial court's grant of summary disposition. finding that on the facts of this case we erred in finding summary disposition was granted pursuant to MCR 2.116 (C)(8). The Supreme Court further directed this Court to decide whether the claims raised in plaintiff's complaint are preempted by the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1144(a). 466 Mich 894. We hold that plaintiff's claims are preempted and, therefore, affirm.

I. Facts and Proceedings

Plaintiff C.C. Midwest, Inc., a trucking company, is a wholly owned subsidiary of CenTra, Inc. (CenTra). Until 1996, CenTra also owned Central Transport, Inc. (Transport), another trucking company. At the time of the sale, Transport employed approximately 235 truck drivers, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Teamsters), as independent contractors. As members of the Teamsters, the truck drivers were entitled to take part in the Central States, Southeast and Southwest Regions Pension Fund (Pension Fund), a multi-employer pension trust that provides pension benefits to Teamster members.[1] As part of a collective bargaining agreement between Transport and the Teamsters, Transport made financial contributions to the Pension Fund on behalf of the truck drivers it employed. Following the 1996 sale, Transport negotiated with the Teamsters the closing of its business. As part of the closure, Transport agreed to pay a severance package totaling $4.6 million and, according to plaintiff, defendants agreed to permit the former independent contractors to make self-contributions into, the Pension Fund for up to five years.

After Transport closed plaintiff contacted truck drivers previously employed by Transport in order to negotiate possible independent contractual agreements, eventually entering into contracts with fifty-nine owner-operators who were former Transport drivers. Plaintiff alleges that thereafter, defendants advised these and other owner-operators by letter and a meeting in Fort Wayne, Indiana that the drivers would not be able to continue to make self contributions to the Pension Fund if they performed work for plaintiff or any other company affiliated with CenTra. Plaintiff characterizes

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[1] Defendant Kubalanza is the Executive Director of the Pension Fund and the remaining defendants are the trustees of the Pension Fund.

these communications by defendants as threats that resulted in twelve of fifty-nine former Transport drivers subsequently terminating their contracts with plaintiff. In addition, plaintiff asserts that it had a reasonable expectation of negotiating contracts with an additional 153 truck drivers not formerly affiliated with Transport, but that notice of defendants alleged "threats" was communicated throughout the trucking industry resulting in plaintiff only being able to contract with twenty-eight of the 153 potential truck drivers not previously associated with Transport.

Defendants dispute plaintiff's characterization of the meeting and the letter contending that their sole purpose was to inform former Transport workers of the options they had available as a result of Transport's closing, and to also inform them of the consequences employment with plaintiff, or other trucking companies, would have on their rights under the severance agreement negotiated between Transport and the Teamsters as it applied to the Pension Fund.

After plaintiff filed the case in Oakland Circuit Court, defendants removed the case to the federal district court, where they argued that the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC IOO1 *et seq.*, preempted plaintiff's state law tort claims. The federal court found that because plaintiff's complaint asserted solely state clams and since ERISA did not provide plaintiff an opportunity to bring a civil enforcement action under § 1132(a), the case was not removable wader ERISA. *CC Mid West v McDougall*, 990 F Supp 914, 924 (1998).

Thereafter, on remand to state court, defendants moved-for summary disposition pursuant to MICR 2.116(C)(4) and 2.116(C)(8). Defendants argued that the trial court did not have jurisdiction to hear the case because ERISA preempted plaintiff's state claims and, alternatively, that plaintiff failed to state a claim on which relief could be granted. The trial court granted defendants' motion stating on the record that

the existence and administration of the Pension Fund is a critical element of plaintiff's claims, and therefore, plaintiff's claims were preempted by ERLSA. The order entered by the trial court stated that defendant's motion was granted under both MICR 2.11 6(C)(4) and (C)(8).

We now consider the preemption issue as directed by the Supreme Court on remand.

II. Standard of Review

This Court reviews de novo the grant or denial of a motion for summary disposition. *de Sanchez v Dept of Mental Health*, 467 Mich 231, 235; 651 NW2d 59 (2002). We also review de novo the legal question whether a court has subject matter jurisdiction. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001). "When reviewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

III. Analysis

The preemption provision of ERISA. 29 USC 1144(a). states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate* to any employee benefit plan" subject to ERISA (emphasis added).[2] The inquiry whether ERISA preempts plaintiff's common law claims begins with the "presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plant v Travelers Inns Co*, 514 US 645, 654; 115 S Ct 1671; 131 L Ed 2d 695 (1995). Indeed, the

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[2] ERLSA does not preempt "any law of any state which regulates insurance." 29 USC 1144(b)(2)(A). This exception is not applicable to this case.

party urging a finding of preemption bears the "considerable burden" of overcoming this presumption, particularly where the subject law is in an area traditionally regulated by the states. *DeBuono v NYSA-ILA Medical and Clinical Services Fund*, 520 US 806, 813-814; 117 S Ct 1747; 138 L Ed 2d 21 (1997).

In a number of its opinions addressing this issue, the United States Supreme Court has recognized that the term "relate to" "cannot be taken 'to extend to the furthest stretch of its indeterminacy.' because under such construction 'for all practical purposes preemption would never run its course.'" *Egelhoff v Egelhoff*, 532 US 141, 146; 121 S Ct 1322; 149 L Ed 2d 264 (2001), quoting *Travelers, supra* at 655; *DeBuono, supra* at 813-814. As such, "a state law relates to an ERISA plan only 'if it has a connection with or reference to such a plan.'" *Egelhoff, supra* at 147; quoting *Shaw v Delta Air Lines, Inc*, 643 US 85, 97; 103 S Ct 2890; 77 L Ed 490 (1983). Despite the Supreme Court's further clarification of the term "relate to," we heartily agree with the sentiment expressed by other courts that "the Supreme Court '[has] been at least mildly schizophrenic in mapping [the] contours [of ERISA preemption].'" *Trustees of the AFTRA Health Fund v Biondi*, 303 F 3d 765, 773 (CA 7, 2002), quoting *Carpenters Local Union No. 26 v US Fid & Guar Co*, 215 Fad 136, 139 (CA 1, 2000).

Because defendants do not argue that the Michigan common law actions reference an ERISA plan, the question before us is whether plaintiff s cause of action relies upon state law which has an impermissible connection with an ERISA plan. "[T]o determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *California Div Of Labor Standards Enforcement v Dillingham Constr, NA,*

Inc, 519 US 316, 325; 117 S Ct 832; 136 L Ed 2d 791 (1997), quoting *Travelers, supra* at 656.[3] Some causes of action, however, are simply "too tenuous, remote, or peripheral" to relate to an ERISA plan. *Shaw, supra* at 100 n 21. In deciding which actions are connected to an ERISA plan by too few threads, we consider factors such as "whether the state law represents a traditional exercise of state authority"; whether the state law "affects relations among the principal ERISA entities rather than relations between one of the principal entities and an outside party, or between two outside parties"; and "whether the state law's effect on the ERISA plans is incidental, thereby having too tenuous a relation to an ERISA plan to `relate to' the plan." *Redall Industries, Inc v Wiegand*, 876 F Supp 147, 150-151 (1995), citing *Firestone Tire & Rubber Co v Neusser*, 810 F 2d 550, 555-556 (CA 6, 1987).

The parties have each cited numerous cases in support of their respective views as to whether ERISA preempts claims for tortious interference with a contract or business expectancy. The common theme emerging from these cases, is that the' determination is made on a case-by-case basis. "'[I]t is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit.'" *MacKay v Grumman Allied Industries, Inc*, 993 F Supp 1068, 1070 (WD Mich 1997), quoting *Cromwell v Equicor-Equitable HCA*

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[3] When Congress passed the preemption provision, it intended

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directive among the States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." [*Travelers, supra* at 656-657, quoting *Ingersoll-Rand Co v McClendon*, 498 US 133,142;112 S Ct 478,112 L Ed 2d 474 (1990).]

Corp, 944 F 2d 1272, 1276 (CA 6, 1991). Therefore, the context of the claim, rather than just its title, is crucial to determining whether the claim is preempted by ERISA.

Within this framework, we turn to an analysis of plaintiff's claims. Defendants characterize plaintiff's claims as allegations that defendants violated their fiduciary duties owed pursuant to ERISA, and assert that ERISA provides the exclusive remedy for breach of their fiduciary duties. Defendants also claim that plaintiff merely disputes a benefits determination that defendants made that allegedly caused harm to the plan participants and that plaintiff is actually making a claim for benefits on behalf of the drivers. We are compelled to disagree with defendants' characterizations of plaintiff's claims. Initially, we note that by vacating our opinion, which found that summary disposition had been granted by the trial court under an MCR 2.116 (C)(8) analysis because plaintiff did not state a viable tortious interference claim, the Supreme Court has implicitly held that plaintiff did state a viable claim. Secondly, because defendants do not stand in a fiduciary relationship with plaintiff, plaintiff's claims do not arise out of an alleged breach of a fiduciary duty. Additionally, plaintiff's claims are for harm suffered in its own right, not for any harm suffered by the drivers, as is the nature of claims for tortious interference. Nevertheless, we conclude that plaintiff's claims are preempted by ERISA.

As we stated in our prior opinion, defendants, as fiduciaries of the Pension Fund, had a statutory obligation under ERISA to inform plan participants of matters that could affect their interests under the plan. See *Varity Corp v Howe*, 516 US 489, 502; 116 S Ct 1065, 1073; 134 L Ed 2d 130 (1996); See also 29 USC 1104(a). In addition, plan participants are always entitled to information necessary to enable the participant to enforce his rights under a plan or to redress a breach of trust. See, e.g., *In re Childress Trust*, 194 Mich App 319, 328; 486 NW2d 141 (1992), citing I Restatement Trusts,

2d, § 173, comment c, p 378. The United States Supreme Court further stated in *Varity, supra*, that:

> Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of power "appropriate" to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan. . . . To offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially the same kind of plan-related activity. (*Id.* at 502-503; 116 S.Ct. at 1073, citing ERISA §§ 102, 104(b)(1), 105(a).]

As we did in our first opinion, we again conclude that defendants' actions were undertaken as fiduciaries of the Pension Fund. By law, defendants had a duty to inform the plan participants of their rights under the plan and how those rights may be affected by certain employment contracts. *Varity, supra; In re Childress Trust, supra.* The meeting held with and the letter sent to the plan participants by defendants informed the participants that their opportunity to make self-contributions to the plan for a period of up to five years could be jeopardized by employment with certain companies, including plaintiff, and informed the plan participants to contact the Pension Fund's toll free number in order to find out how their decisions may impact their benefits. The trial court did not err by concluding that even if the administration of the fund was malicious an alleged by plaintiff, the manner in which the Pension Fund was administered is a critical factor in plaintiff's claims and thus plaintiffs claims arc subject to preemption. See *Ingersoll-Rand Co v McLendon*, 498 US 133, 139-140; 111 S Ct 478; 112 L Ed 2d 474 (1990).

Although preemption of a state law claim does not exist when only a "cursory. examination" of an ERISA plan's

provisions is required, *Biondi, supra* at 780, ERISA does 'preempt] a state Jaw claim if the claim requires the court to interpret or apply the terms of an employee benefit plan.'" *Id*, quoting *Collins v Ralston Purina Co*, 147 F 3d 592, 595 (CA 7, 1998). Here, because resolution of plaintiff's claims requires the court to determine whether defendant's communications were appropriate under the terms of the fund, the court must go beyond a "cursory examination" of the plan's provisions and interpret its terms. Unlike the plaintiff in *Darcangelo v Verizon Communications, Inc*, 292 Fad 181, 193 (CA 4, 2002), here the plaintiff does not assert "improper conduct so unrelated to the plan that it cannot be termed 'plan .administration' of any sort," but claims that defendants committed torts in tandem with performance of their fiduciary duties. *Id.* Although plaintiff's claims are not intimately tied to "core concerns of the ERISA legislation[,] . . . the plan and the communications giving rise to the [tortious interference claim] appear inseparable." *Fairnerry v Savogran Co*, 422 Mass 469.476; 644 NE2d 5 (1996).

While we recognize that plaintiff also alleges injuries concerning its dealings with owner-operators throughout the trucking industry that had no prior association with Transport, we are not persuaded that these allegations are sufficient to avoid preemption. Plaintiff does not allege in the Complaint that defendants communicated with non-participant owner-operators in any respect. Thus, even if.defendants knew or reasonably should have known that owner-operators throughout the industry might become aware of these communications, the character of these communications as between defendants as fiduciaries and former Transport owner-operators as plan participants does not render the doctrine of preemption inapplicable here. In similar vein, the fact that plaintiff may be left without. a meaningful remedy does not alter the fact of preemption. *Muse v International Business Machines Corp*, I03 Fad 490, 495 (CA 6, 1995); *Massa-*

chusetts Cas Ins Co v Reynolds, 113 Fad 1450, 1454 n 2 (CA 6, 1997).

In summary, we find that plaintiff's claims are preempted by ERTSA and that summary disposition was properly granted.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

APPENDIX D

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[Filed July 22, 2002]

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 120336
COA: 213386
Oakland CC: 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

On order of the Court, the application for leave to appeal from the June 22, 2001, decision of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND the case to the Court of Appeals as on rehearing granted to decide the preemption issue. On the facts of this case, it is error to say that the trial

court's decision was granted pursuant to MCR 2.116(C)(8). Accordingly, we VACATE the judgment of the Court of Appeals.

We do not retain jurisdiction.

[Logo]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 22, 2002

/s/ Corbin R. Davis
CORBIN R. DAVIS
Clerk

APPENDIX E

STATE OF MICHIGAN
COURT OF APPEALS

[Filed June 22, 2001]

No. 213386
Oakland Circuit Court
LC No. 97-550272-NZ

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

In this tortious interference of contract and business expectancy case, plaintiff appeals as of right from the trial court's order granting defendants' summary disposition pursuant to MCR 2.116(C)(4) and (C)(8).[1] We affirm.

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[1] Plaintiff contends that the trial court granted summary disposition pursuant to MCR 2.116(C)(4). At the May 6, 1998 summary disposition motion hearing, the trial court stated that it was granting defendant's motion pursuant to MCR 2.116(C)(4). However, the written order dated and filed, May 8, 1998 states that summary disposition was granted pursuant to MCR 2.116 (C)(4) and (C)(8). Because a trial court speaks through its written orders, the record reveals that defendants' motion was granted pursuant to both MCR 2.116 (C)(4) and (C)(8). See *People v Davie*, 225 Mich App 592, 600; 571 NW2d 229 (1997); See also *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

I. Facts and Proceedings

Plaintiff C.C. Midwest, Inc., a trucking company, is a wholly owned subsidiary of CenTra, Inc. (CenTra). Until 1996, CenTra also owned Central Transport, Inc. (Transport), another trucking company. At the time of the sale, Transport employed approximately 235 truck drivers, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Teamsters), as independent contractors. As members of the Teamsters, the truck drivers were entitled to take part in the Central States, Southeast and Southwest Regions Pension Fund (Pension Fund), a multi-employer pension trust that provides pension benefits to Teamster members.[2] As part of a collective bargaining agreement between Transport and the Teamsters, Transport made financial contributions to the Pension Fund on behalf of the truck drivers it employed. Following the 1996 sale, Transport negotiated with the Teamsters the closing of its business. As part of the closure, Transport agreed to pay a severance package totaling $4.6 million and, according to plaintiff, defendants agreed to permit the former independent contractors to make self-contributions into the Pension Fund for up to five years.

After Transport closed, plaintiff contacted truck drivers previously employed by Transport in order to negotiate possible service contracts, eventually entering into contracts with fifty-nine former Transport drivers. However, after being informed by defendants that they would not be able to continue to make self-contributions to the Pension Fund if they performed work for plaintiff or any other company affiliated with CenTra, twelve of these fifty-nine drivers terminated their contracts with plaintiff. In addition, plaintiff believed that it had a reasonable expectation of entering into

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[2] Defendant Kubalanza is the Executive Director of the Pension Fund and the remaining defendants are the trustees of the Pension Fund.

contracts with an additional 153 truck drivers not formerly affiliated with Transport, but as a result of defendants "threats", plaintiff was only able to hire twenty-eight of the 153 potential non-Transport truck drivers.

In its complaint, plaintiff alleged that defendants actions of informing the former Transport workers that they would not be able to participate in the Pension Fund if they worked for plaintiff, amounted to threats, and that these "threats" were a deliberate attempt to deny plaintiff the services of the truck drivers. According to plaintiff, these "threats" occurred at a meeting held in Fort Wayne, Indiana in April of 1997 and in a follow-up letter dated May, 7, 1997. According to defendants, the purpose of both the meeting and the letter was to inform former Transport workers as to what options they had available to them as a result of Transport's closing and to also inform as to what consequences employment with plaintiff or other trucking companies, would have on their rights under the severance agreement negotiated between Transport and the Teamsters as it applied to the Pension Fund. Specifically, plaintiff complained that defendants knew or had reason to know that it had entered into contractual relationships with timer Transport drivers, and that defendants intentionally interfered with these contracts when they authorized or conveyed to former Transport drivers "threats" regarding nonacceptance of self-payments to the Pension Fund for periods in which they enter into independent contractor agreements with plaintiff It was further alleged that defendants made these "threats" to the drivers in an effort to inflict injury upon plaintiff.

After plaintiffs filed the case in Oakland Circuit Court, defendants removed the case to the federal district court, where they argued that the Employment Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq.*, preempted plaintiff's state law tort claims. The federal court found that because plaintiffs complaint asserted solely state

claims and since ERISA did not provide plaintiff an opportunity to bring a civil enforcement action under § 1132(a), the case was not removable under ERISA. *CC Mid West v McDougall*, 990 F Supp 914, 924 (1998).

Thereafter, on remand to state court, defendants moved for summary disposition pursuant to MCR 2.116(C)(4) and 2.116(C)(8). Defendants argued that the trial court did not have jurisdiction to hear the case because ERISA preempted plaintiff's state claims and, alternatively, that plaintiff failed to state a claim on which relief could be granted. The trial court granted defendants' motion stating on the record that the existence and administration of the Pension Fund is a critical element of plaintiff's claims, and therefore, plaintiff's claims were preempted by ERISA. Nonetheless, the trial court granted defendant's motion under both MCR 2.116(C)(4) and (CX8).

II. Standard of Review

This Court's review of a motion for summary disposition is reviewed de novo in order to determine whether the moving party was entitled to judgment as a matter of law. *Rheaume v Vandenberg*, 232 Mich App 417, 420; 591 NW2d 331 (1998); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). With regard to a motion pursuant to MCR 2I 16(C)(4), we are to consider all pleadings, affidavits, and other documentary evidence submitted by the parties and construe them in favor of the nonmoving party. *Beulah Hoagland Appelton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). For a motion to be granted under MCR 2.116(CX8), the pleadings must make it clear that the plaintiff has failed to state a claim on which relief can be granted and that no amount of factual development would justify the plaintiff's claim for relief. *Spiek, supra*. Further, the pleadings are comprised of the complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an

answer. *Village of Diamondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000), citing MCR 2.110(A); See also *Ferrell v Vic Tanny*, 137 Mich App 238, 243; 357 NW2d 669 (1984) and MCR 2.113(F)(1 Kb) and (F)(2).

III. Analysis

On appeal, plaintiff argues that the trial court erred in determining that the general preemption provision of ERISA, § 1144(a), applied in this case and that its tortious interference claims were claims on which relief could be granted. In contrast, while defendants maintain that ERISA preempts plaintiffs tortious interference claims, they alternatively argue that the trial court correctly granted summary disposition to them pursuant to MCR 2.116(CX8). Because we agree that plaintiff failed to state a claim on which relief could be granted, we affirm. Since we find that plaintiff failed to state a valid tortious interference claim under either of its two counts, we find it unnecessary to decide the question of whether plaintiff's claims are preempted by ERISA.

As a preliminary matter, we note that plaintiff failed to include the issue of whether the trial court correctly ruled on defendant's (C)(8) motion as a question presented before this Court. Thus, the issue has not been properly presented for appellate review and ordinarily we would not consider it. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000); See also MCR 7.215(C)(5). Nonetheless, because the issue is a question of law and the facts necessary for its resolution have been presented, *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995); *McKelvie v Auto Club Ins Assn*, 203 Mich App 331, 337; 512 NW2d 74 (1994) and since defendant properly raised the issue as an alternative ground for affirming the trial

court's decision and we find it to be dispositive,[3] we will address it. *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *In re Herbach Estate*, 230 Mich App 276, 284; 583 MW2d 541 (1998).

The elements of tortious interference with a business expectancy or relationship are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) damage to the plaintiff. *BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996), citing *Lakeshore Community Hasp v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). Similarly, the elements of tortious interference with contractual relations are that (1) a contract existed, (2) it was breathed, and (3) defendant instigated the breach without justification. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992), citing *Jim-Bob, Inc v Melding*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989); See also *Derosia v Austin*, 115 Mich App 647, 653; 321 NW2d 750 (1982). In order for a plaintiff to recover under either theory of tortious interference, the plaintiff must allege that the defendant's international interference was a "'per se wrongful act or the doing of a lawful act with malice'" and without justification in law. *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). See also *BPS, supra*. For an act to be "wrongful per se", it must be an act "that is inherently wrongful or an act that can never be justified under any circumstances." *Patillo v Equitable Life Assurance Society of*

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[3] We note that even if we were to agree with plaintiff that it's claims were not preempted, we would then have to address the issue of whether plaintiff's complaint alleged a valid claim on which relief can be granted.

the United States, 199 Mich App 450, 457; 502 NW2d 696 (1992), citing *Prysak v RL Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). To show that a lawful act was committed with malice and without justification in law, "the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive or interference." *BPS, supra*, citing *Feldman, supra* at 369-370; See also *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994); *Dolenga v Aetna Casualty & Surety Co*, 185 Mich App 620, 626; 463 NW2d 179 (1990). Further, if a defendant's actions were motivated by legitimate business reasons, then those actions would not constitute improper motive or interference. *BPS, supra*, citing *Michigan Podiatric Medical Assn v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989)

Defendants, as fiduciaries of the Pension Fund had a statutory obligation under ERISA to inform plan participants of matters that could affect their interests under the plan. See *Varity Corp v Howe*, 516 US 489, 502; 116 S Ct 1065, 1073; 134 L Ed 2d 130 (1996); See also 29 USC 1104(a) and MCL 700.814(1); MSA 273814(1). In addition, plan participants are always entitled to information necessary to enable the participant to enforce his rights under a plan or to redress a breach of trust. *In re Childress Trust*, 194 Mich App 319, 328; 486 NW2d 141 (1992), citing 1 Restatement Trusts, 2d, § 173, comment c, p 378. The United States Supreme Court further stated in *Varity, supra*, that:

> Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of power "appropriate" to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan.. . . To offer beneficiaries detailed plan information in order to

> help them decide whether to remain with the plan is essentially the same kind of plan-related activity. [*Id.* at 502-503; 116 S Ct at 1073, citing ERISA §§ 102, 104(b)(1), 105(a).]

Here, it is apparent that defendants actions were undertaken as fiduciaries of the Pension Fund. By law, they had a duty to inform their participants of their rights under the plan and how those rights may be effected by certain employment contracts. *Varity, supra; In re Childress Trust, supra.* The letter defendants salt to the plan participants clearly informed the participants that they had the opportunity to make self-contributions for a period of up to five years and also informed them that they could not make contributions during any period of time in which they were employed by certain companies, including plaintiff. The letter also communicated to the participants of the plan that they should contact the Pension Fund's toll free number in order to find out how, their decisions may impact their benefits. As such, it is apparent that defendants were acting under legally mandated obligations to inform its participants of its rights under their plan.[4] Hence, defendants were motivated, at least in part,

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[4] In fact, after reviewing the record, this Court has been unable to find any evidence or assertion by plaintiff attacking the veracity of defendant's letter concerning the participants' employment with plaintiff. Instead, plaintiff maintains that the participants were not entitled to make benefits regardless of their employment status. Assuming this to be true, then plaintiff's claim is without merit. The former Transport drivers would have become aware of this fact when their self-contributions were denied, therefore, indicating to the former Transport drivers that working for plaintiff would have no impact on their ability to make (or not make) self contributions to the Fund. Accordingly, giving plaintiff the benefit of the doubt on this question, we are persuaded that defendant's actions caused no damage to plaintiff See *BPS, supra* at 687. Further, plaintiff's complaint does not indicate how defendant's "threats" to the former Transport workers would have any affect on the non-Transport drivers decisions to work for plaintiff.

by legitimate business reasons and therefore could not have tortiously interfered with plaintiff's contracts or business expectations. *BPS, supra; Coleman-Nichols, supra*; See also *Patine, supra.* Accordingly, defendants were entitled to summary disposition pursuant to MCR 2.116(C)(8).[5]

Because we find that summary disposition was 4pp,opriate under (C)(8), we need not determine plaintiff's claim was also properly dismissed under (C)(4) based ERISA preemption. See *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 529; NW2d (2000), citing *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997); *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147, 150; __NW2d.__ (2000). See also *Kurz v Michigan Wheel Corp*, 236 Mich App 508, 516; 601 NW2d 130 (1999); *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda It. Gage
/s/ Kurtis T. Wilder

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[5] Even though this decision is reached by reviewing the contents of defendant's letter to the Pension Fund participants, because the letter was a written document, attached to plaintiff's complaint, and plaintiffs complaint relied on the letter, this Court should review the letter when assessing whether plaintiff stated a claim on which relief could be granted. See *Ferrell, supra* at 243. Sec also MCR 2.113(F)(1)(B) and (F)(2); 4 Dean & Loaghofer, Michigan Court Rules Practice, pp 316-317 (1998).

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

[Filed May 15, 1998]

Case No. 97-550272-NZ

C.C. MID WEST, INC.,

Plaintiff,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,

Defendants.

BUTZEL LONG
ROBERT J. BATTISTA (P10540)
MICHAEL F. SMITH (P49472)
150 W. Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7006
Attorneys for Plaintiff

HONIGMAN MILLER SCHWARTZ AND COHN
STEPHEN WASINGER (P25963)
PETER M. ALTER (P10145)
RICHARD T. KARCHER (P57138)
2290 First National Building
Detroit, Michigan 48226
(313) 256-7606
Attorneys for Defendants

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS AND DISMISSING CASE

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan on May 8, 1998.

PRESENT: DENISE LANGFORD-MORRIS
Hon. Denise Langford-Morris

Upon reading Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(4)—Lack of Subject Matter Jurisdiction—And (C)(8)—Failure to State a Claim and Brief in Support and exhibits attached thereto; having read Plaintiff's Response to Defendants' Motion for Summary Disposition Pursuant to MCR 2.1I6(C)(4)—Lack of Subject Matter Jurisdiction—And (C)(8)—Failure to State a Claim; having read Defendants' Reply Brief in Further Support of Their Motion for Summary Disposition; oral argument having been heard on Wednesday afternoon, May 6, 1998; it appearing that Defendants are entitled to the relief requested; and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(4)—Lack of Subject Matter Jurisdiction—And (C)(8)—Failure to State a Claim shall be and is hereby granted, and the case is dismissed, for all of the reasons set forth on the record in open court.

DENISE LANGFORD-MORRIS
Hon. Denise Langford-Morris

APPROVED AS TO FORM:
BUTZEL LONG
Attorneys for Plaintiff
ROBERT J. BATTISTA (P10540)
MICHAEL F. SMITH (P49472)
150 W. Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7006

HONIGMAN MILLER SCHWARTZ AND COHN
Attorneys for Defendants
STEPHEN WASINGER (P25963)
PETER M. ALTER (P10145)
RICHARD T. KARCHER (P57138)
2290 First National Building
Detroit, Michigan 48226
(313) 256-7606

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Case No. 97-550272-NZ

C.C. MID WEST, INC.,

Plaintiff,

v

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,

Defendants.

SUMMARY DISPOSITION MOTION

PROCEEDINGS had in the above-entitled matter be fore the HONORABLE DENISE LANGFORD MORRIS (P34884). Circuit Judge, on WEDNESDAY, MAY 6, 1999.

APPEARANCES:

MICHAEL F. SMITH. Esq., (P49472)
appearing on behalf of the Plaintiff.

STEPHEN WASINGER, Esq., (P25963)
PETER A. ALTER, Esq., (P10145)
JAMES D. O'CONNELL,
appearing on behalf of the Defendants.

PAMELA L. VOLL
Official Court Reporter
CSR 0195

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SIXTH JUDICIAL CIRCUIT
WEDNESDAY, MAY 6, 1998

COURT CLERK: Calling the matter of C.C. Mid West versus McDougall, et al. case no. 97-550272-NZ.

THE COURT: Appearances.

MR. WASINGER: Your Honor, for the Defendants, Stephen Wasinger and Peter Alter. Also with us here today is Mr. James O'Connell who is a lawyer with the Defendant Central States Funds.

MR. SMITH: Michael F. Smith, on behalf of the Plaintiff C.C. Mid West.

THE COURT: You may proceed.

MR. WASINGER: Thank you, Your Honor.

I think the parties' briefs cover, Your Honor, the issues, and what I would like to do and what I had hoped to do is not spend a lot of time repeating what is in the briefs, but rather try to focus on what appears to emerge as the central and core issues.

Your Honor will recall that this case involves a claim by C.C. Mid West that the Defendants, who are all fiduciaries of an ERISA pension plan, have tortiously interfered with them when they made certain decisions about benefits under the plan and communicated those plans to the beneficiary.

The case was originally removed to Federal Court, but Judge Rosen decided that under the well pleaded complaint rule, that the removal was inappropriate, and it was remanded back to this Court. I don't think there's any dispute about the fact that Judge Rosen did not decide the underlying question whether the claims were preempted by ERISA, and in fact, as Judge Rosen himself said, he couldn't do that.

What really has emerged, it seems to me. Your Honor, with that background in mind, is that C.C. Mid West, which is a trucking company that wanted to employ and did employ some of the beneficiaries has contended that a decision that the fiduciaries made was malicious and, therefore, it gives rise to a state law claim. What the fiduciaries argue is that in fact the Court cannot even begin to resolve that dispute without looking at the terms of the plan.

And I think perhaps the clearest way of seeing this, Your Honor, is to look at the brief that was filed by C.C. Mid West itself where they contend, among other things, at page 12 of their brief that the fiduciaries used an inappropriate reason under the plan. They suggest, for example, that the decision by the fiduciaries to allow the participants to self-pay was an abuse of the terms of the plan. And this, it seems to me, and to the fiduciaries, gets to the core issue. If the fiduciaries misread the plan, or if the fiduciaries deceived the beneficiaries about the terms of the plan, then those issues are issues which necessarily cause this Court to have to look to the plan and look to the actions of the fiduciaries, and that isn't a matter that is exclusively one of federal concern.

Similarly the C.C. Mid West brief argued that, well, this is a situation where we're not really seeking damages from the plan. What we're trying to do is seek damages from these fiduciaries; but the fiduciaries, Your Honor, under the terms of the complaint, were acting in their capacity as fiduciaries, and therefore the only way that one could determine whether they were liable individually or liable on behalf of the fund is

to look at the terms of the plan and the scope of Federal fiduciary duty law under ERISA to determine whether that was true.

Said another way, and perhaps, more simply, Your Honor, if the fiduciaries had made a different decision about benefits, if the fiduciaries had said that there were benefits here, we wouldn't have a complaint. The complaint is based on the fact that the fiduciaries decided that there weren't benefits available to people who went to work for C.C. Mid West because of their understanding of the plan and various other issues that arise out of the construction of the plan.

Similarly, if the fiduciaries had not communicated with the beneficiaries, there would not be a claim here, but they did communicate with the beneficiaries, and as the Supreme Court cases make clear, Your Honor, they were obligated to communicate with the beneficiaries about their benefits.

So, what we have I think here is a very core ERISA, concern; that is to say a determination of benefits, a communication about benefits, and now a claim by a third party that somehow or another it has been harmed by those considerations.

But in order for the Court to give any credence to C.C. Mid West's claims, the Court in essence would subject the fiduciaries to a standard that is different than the standard under ERISA, and in doing so, they would subject the fiduciaries to different standards of different federal and state standards. and that is precisely what ERISA preemption is all about.

The biggest argument that comes from C.C. Mid West's brief is that we really are an outsider and somehow or another because we're an outsider, that should change the Court's analysis. But I think that the Court could consider it in this ways and that's why I said the decision about benefits is the key decision. If one came—if an ERISA fiduciary made a decision in the best interests of the plan. Your Honor, that it

would purchase prescription drugs from Arbor Drug Store because they had the best prices, and therefore it was in the best interests of the beneficiaries, Walgreen Drug Stores would not be allowed to come into court and complain that somehow or another that harmed them because they weren't selected to be a provider to the plan. In that situation, the Court would have to examine the fiduciaries' determinations, and in doing that, the Court would be necessarily involving itself in the administration of the plan.

There has been a suggestion in the brief of C.C. Mid West that the problem with the trustee's claim is that it arises out of old ERISA cases and that there has been some sea change in the court—in the decisions since those earlier decisions were decided. And I think, Your Honor, that simply isn't correct. If one looks at the cases, all of the cases continue to recite the same principles and the same principles whether they're in the newer cases or the older cases, and those principles are basically these: If the claim requires the Court to look to the terms of a plan in order to decide whether somebody's right has been violated or not, then the claim is preempted, whether or not you specifically so state or not. And the primary example of that kind of case was the Ingersoll-Rand case whether they made a determination—where the person brought a wrongful termination claim under state law and argued that because—that he was wrongfully terminated because the employer didn't want to pay pension benefits. The Texas Supreme Court held that that claim wasn't preempted. The United States Supreme Court held that it was because necessarily, the Court, in order to decide whether there was wrongful termination would have to look to the terms of the plan.

Most of the cases that C.C. Mid West has cited are cases that involve a different set of circumstances; they are claims where there is a fiduciary or a plan or whatever that has dealing outside of the benefit context, outside of the commu-

nication with beneficiaries about benefits context. The one case that they think—that they suggest is the closest is the *Strehl* case, Your Honor, and that case really demonstrates the point. What happened there, there was a defamation claim under state law. The argument was that the trustees had defamed a physician. The Court was careful to say that that claim did not involve any examination of the plan itself or any benefit determination under the plan, and the Court made clear that if there had been a benefit determination, or if the Court would have to look to the terms of the plan, then there would be preemption.

I want to also address, Your Honor, the separate and distinct issue, which I think illustrates why this really is a claim that should be preempted or in any event, found to be inappropriate even under state law, because essentially what is happening here is the C.C. Mid West is attempting to chill the behavior of the fiduciaries by having the fiduciaries consider the actions of third—the rights of third parties when they go about making a decision whether there is a benefit or there isn't a benefit. And as I said earlier, there wouldn't be a case here, Your Honor, if the trustees had concluded that these participants were entitled to a continuation of self-payment if they worked for C.C. Mid West; it's only because the benefit determination turned out the other way.

And as we pointed out in our principal brief, and as I don't think C.C. Mid West has ever really quarreled with, it's fundamentally the case that trustees or fiduciaries, whether its under Michigan law or whether it's under ERISA, are not entitled to consider the interests of third parties, be they C.C. Mid West or anyone else, in making a decision whether benefits are appropriate. And if they do, the remedy is a remedy under the fiduciary duty law, not under some other law.

And what would happen in this case, Your Honor, if the kind of claim that C.C. Mid West is asserting were allowed, is that there would be a chilling effect upon the ability of

trustees, be they ERISA trustees or common law trustees, to carry out their duties because they'd be subject to second guessing by any person who might be injured by a decision because the trustee chose to do business with A rather than B, or because the trustee chose to give a particular benefit or not give a particular benefit.

And that's why we also suggested, Your Honor, that there is a fundamental public policy issue with this claim. I think that as I said earlier, the briefs have covered this pretty well, but again, in summary, I really think that if you just look at their own brief and see what they complain about, they complain about the fact that we either misread our plan or miscommunicated what the plan was to the beneficiaries, and therefore they necessarily want this Court to read the plan and make decisions about the plan.

Thank you, Your Honor.

THE COURT : Thank you.

Any response?

MR. SMITH: Your Honor, this is not about the decision. It's not about the communication. It's about these individuals acting with the one tool that they had at their disposal, and that's access to these individuals' retirement benefits in an effort to harm C.C. Mid West. That's what this case is all about. It's not about the terms of the plan.

Now, I think we've heard some of this regarding the sweep of ERISA preemption before. The Defendants in Federal Court, when they removed from this Court, tried to sell the Court with that. I think clearly they over-stated the sweep of ERISA preemption, and I think they're doing it again here today.

It's clear that under the recent Supreme Court decisions there is more that goes into the decision than just saving a claim relates to ERISA or a state law relates to ERISA. And I

think given the analysis that we've provided in our brief, it seems clear the C.C. Mid West's claim is not preempted.

I think when you boil down the Defendants' claim, what they're saving is prosecution of this lawsuit would improperly interfere with their duty to make decisions under the plan, and, in effect, it would tie them up with all sorts of state law duties that ERISA doesn't comprehend. Well for ten years it's been the case that ERISA plans and fiduciaries are subject to state laws of general applicability. I think if you look at the Supreme Court's case in *Mackey* that we cited in our brief, that's the case. What the Court says is run of the mill claims for unpaid rent, unpaid creditors, even torts are not subject to preemption.

I think the two cases of *Strehl*, which counsel mentioned, and also *Grand Park Surgical Center*, which we cite, are directly on point. Here you have cases where you have third parties to an ERISA plan. They're not beneficiaries, they're not participants, they're not fiduciaries, asserting claims arising out of actions that fiduciaries have taken. And. clearly, in both those instances, the claim survived a preemption argument. And I submit that this case is more analogous to those two cases than any other that Defendants have cited.

Acceptance of their argument that ERISA provides some sort of bullet-proof vest for any decision they make would insulate these individuals from any liability for anything.

We make the point in our response—and I don't think it was ever responded to—of the trustees making a decision about plan benefits, conditioning it upon participants going out and committing some unlawful act. If you go and break the shop windows of every merchant who belongs to certain ethnic groups, certain racial groups, you can have this benefit. If you apply their standard, they could make that decision and be immune from liability. And I don't think it's too much of a stretch to say that Congress never intended that that happen in an acting ERISA preemption.

This is especially true here where you've got an area of traditional state law regulation, which tortious interference is. This isn't an area such as in so many of the cases the Defendants cite, where you've got a law that affects hospitals or affects insurance plans. There, it directly impacts upon ERISA entities, and that's why in those cases a preemption is held appropriate.

I think the mention is made in Defendants' reply brief that, no, that's not true, we can't discriminate because title 7 is still out there, Federal law is not preempted, title 7 prohibits us from discriminating. And I think that's indicative of their attitude. They've got this attitude that they're not subject to *Elliott-Larsen*; they're not subject to any other state law regarding discrimination. Accepting that argument, they could make a decision as to benefits based on someone's weight: that's not actionable under title 7: it is actionable under *Elliott-Larsen*, and they'd still be immune.

They have a considerable burden to meet, and I don't think that they've met it here.

The purpose of ERISA preemption, after all, is to protect participants and beneficiaries. It's not to provide fiduciaries with some sort of magic shield that protects them from all liability for any tortious action that they take deliberately. And I would cite the Court to the discussion in the case of *Andrews Clark*, which we cite in our response at 4.

With regard to the Defendants' motion that no claim has been stated, I think it's clear that we have stated a claim, given the elements of the claim under Michigan law, and what we've alleged. Clearly, whether that claim can be supported by the facts is not what we're here to decide today, and it's not known today. But I think looking at the complaint on its face, which the Court is obligated to do, it's clear that we have stated a claim. As was pointed out in the cases of *Seven D Enterprises* and in *Stack*, this inference of regularity that

the Defendants are saying attaches to their actions, has been challenged: it's been challenged by the complaint. They obviously disagree. They don't think they did anything improper. The complaint alleges differently and, therefore, it states a claim sufficient to survive the (C)(8) motion.

I'd like to address a couple of the points that defense counsel brought up in his argument. He cites this case of the two drug stores, this hypothetical. And I think the case that we've cited of *Thrift Drug*, coincidentally involves a drug store, but I think it addresses that issue. Here, you've got a state law claim for breach of contract by a pharmacy for a planned administrator's failure to reimburse for prescriptions that were dispensed. You would have to look at the plan to determine if there was a violation there, if there was a duty to reimburse. That claim survived.

We're not trying to chill the Defendants' ability to make decisions anymore than they're already chilled by the numerous state laws of general applicability that apply to them, and I think that's the paint that needs to be made here.

We've pointed out in our brief, they're subject to numerous laws, just like the rest of us. And where they decide to act on a long-standing animus that they have for this company and its corporate parent by using the one weapon at their disposal to try to drive this company out of business and then they want to hide in Chicago behind ERISA preemption, I don't think that ought to be allowed.

Thank you.

THE COURT: Any brief rebuttal?

MR. WASINGER: Yes. Your Honor.

I think that if one listens to Mr. Smith's argument and then looks at the cases that he says, that one will see exactly the difference between our position, which I believe is the correct position, and their position, take for example the issue about

the *Elliott-Larsen*, law. Clearly, the original ERISA preemption case, *Schell versus Delta Airlines*, Your Honor. was a case that held that the New York Human Rights Law was preempted, and the reason—the particular reason there had to do with the fact that in *Shaw*, the New York Human Rights Law prohibited discrimination based upon gender and pregnancy. And the issue was whether or not ERISA would preempt that statute as regards not to discrimination against people who might work for you, but as regards to benefits. And what the United States Supreme Court said in *Shaw* is that as applied to ERISA plan with respect to ERISA concerns about benefits or otherwise, it is in fact preempted. That's what distinguishes it from other laws of general jurisdiction, such as a criminal law. If you had a criminal law that says you may be an ERISA fiduciary. but you're driving to work and you run over somebody, you can't claim that because you're an ERISA fiduciary that you're not subject to the laws that regulate driving or crime or otherwise. And nobody has suggested that these fiduciaries are entitled in some private or other context to engage to racial discrimination or sexual discrimination or anything other than that. However, when they make a benefit determination, then the state law has to be examined in the context—in that context. And the courts have regularly looked at laws that have salutary state purposes and found them to be preempted when they speak to benefits or when they speak to uniform administration of the plan.

The other matter that he talks about, the *Thrift Drug* case, Your Honor, is exactly our case in terms of demonstrating the distinction because, if you read that case, what the issue there was, there was a pharmacy that claimed that it had not been paid for certain monies, and the question was preemption; it was raised at the last minute. And when they looked at the case, the Court specifically said: These people are not claiming that they misadministered the plan or they had inappropriate standards for reimbursement or anything else. Had they

made that kind of determination, then the claim would be preempted because it would involve us as a court in looking at the terms of the plan to see if it was appropriate. So, if, for example, C.C. Mid West delivered goods to the plan and wanted to be paid for its goods, nobody would suggest that a state law saying you can collect your debts isn't preempted; that's the case that they cite for example where somebody loaned—borrowed money from a plan, and the question was whether that was preempted. No, it isn't. That's a state law concern.

The difference in this case, Your Honor, is specifically they are quarreling about a benefit decision. They are quarreling about the fact that the trustee said: You don't have benefits under this plan if certain circumstances occur. And that's exactly why, Your Honor, in this case there's preemption.

And the other thing I think that we need to keep here in mind is that what they essentially suggest is that if the trustees didn't do it maliciously, then you wouldn't have a state law claim. But if they did it maliciously, you would have a state law claim. Your Honor, that creation of that—of allowing that adjective to transform the scope of ERISA preemption would obliterate ERISA preemption because all anyone would ever have to say is the trustees maliciously made a decision about benefits. That was the case. Your Honor, in the cases that we've cited, like *Ingersoll-Rand*, where the whole point was that the argument was that the beneficiaries were arguing that the trustees did something maliciously.

So. I think that there is a sound and valid distinction that is necessary to be enforced in this case. They are complaining about a benefit decision; they're complaining about communications with the participants about the beneficiary decision, and that's why it's preempted. Thank you, Your Honor.

THE COURT: Thank you.

This matter is before the Court on Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(4) and (8). A response has been filed, and the Court has heard oral argument.

Although, I have to indicate, Mr. Alter, I don't think I've seen you this quiet in quite some time.

MR. ALTER: You're right, Your Honor.

MR. WASINGER: I exert a salutary influence on him, Your Honor.

MR. ALTER: We couldn't both argue. We fought it out, and he got to argue.

THE COURT: I see.

The facts are briefly as follows: This is an action for tortious interference with contractual relations and business expectancies brought by C.C. Mid West, a trucking company, against eight trustees and the Executive Director of the Central States, Southeast and Southwest Areas Pension Fund (hereinafter "Fund"). The Fund is a multi-employer pension benefit plan that receives contributions from employers accepted for participation in the Fund and pays pension benefits to retired employees of those employers. CenTra, Inc. owned Central Transport, a trucking company who was a participant in the Fund.

In 1997, Central Transport shut down its operations and laid off 235 truck drivers who had pension contributions made to the Fund on their behalf by Central Transport. After the lay-off, Defendants allegedly told these drivers that they could self-pay into the Fund to protect their full pension benefits.

Plaintiff, a subsidiary of CenTra, Inc., attempted to employ the services of these drivers and entered into independent

contractor agreements with some of the drivers and was actively negotiating with other drivers. Plaintiff allegedly wanted these drivers to continue self-paving into the Fund.

Defendants claimed that the Fund believed such self-pay contributions by employees working for an affiliate of CenTra, Inc. would violate the Fund's plan and rules regarding self-contributions and adverse selection. Defendant Kubalanza wrote to former Central Transport employees advising them that they would not be able to make self-contributions during any period of time they worked for any CenTra. Inc. affiliate.

Plaintiff alleges that these communications constituted threats that were calculated to force the laid-off drivers who had entered into independent contractor agreements with Plaintiff to sever those ties since Plaintiff did not make contributions to the Fund. Plaintiff claims that Defendants knew or reasonably should have known that the threats would have a chilling effect on negotiations between Plaintiff and former Central Transport employees.

Plaintiff filed suit in Oakland County Circuit Court and Defendants removed the case to Federal Court. The Federal Court issued an opinion in *C.C. Mid West versus McDougall.* 1998 WL 24240 (ED Mich 1998), and ruled that Plaintiff's claims were not removable under ERISA, that the complaint asserted solely state law claims and that Plaintiff would be unable to bring civil enforcement actions under Section 1132(a) because Plaintiff was not a party authorized to do so under that section. The Federal Court found that ERISA simply did not regulate the relationship between C.C. Mid West and the Fund, if a relationship existed, and the Court refused to allow Defendants to inject a federal question into Plaintiff's case to transform the action into one arising under Federal law. The Federal Court remanded the case, however it did not decide the issue of whether there was preemption. Defendants filed the instant Motion for Summary Disposition.

The standard of review is as follows:

MCR 2.114(C)(8) provides for summary disposition for failure to state a claim on which relief can be granted. The Court determines whether Plaintiff has alleged a prima facie case based solely on Plaintiff's pleadings. *Garvelink versus Detroit News*, 206 Mich App 604, 607, 1994; MCR 2.116(G)(5). All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences which can be drawn from the facts. *ETT Ambulance versus Rockford Ambulance*, 204 Mich App, 393, 395, 1994. Mere statements of conclusions, unsupported by allegations of fact will not suffice to state a cause of action. *Id.* Summary disposition is proper if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* At 396.

MCR 2.116(C)(4) provides for summary disposition if the Court lacks jurisdiction of the subject matter. The affidavits, together with the pleadings, depositions, admissions and documentary evidence must be considered by the Court. MCR 2.116(8)(5).

The analysis is as follows:

Certain causes of action brought under state law can be completely preempted by ERISA, and are thus removable to Federal Court, where they fall within the scope of the civil enforcement provisions of ERISA. *Anderson versus EDS*, 11 F3d 1311 (5th Cir, 1994). However, determining which state law actions are completely preempted and which are not is a difficult task. The Supreme Court has recognized two types of civil suits that can be brought against ERISA plans. The first involves suits brought by ERISA entities under the enforcement actions under Section 502 to secure certain specified relief. Such actions generally completely preempt state law. The second category includes lawsuits against ERISA plans for ordinary state law claims such as torts committed by an

ERISA plan, brought by non-ERISA entities. *Mackey versus Lanier Collection Agency*, 486 US 825, 1988. Such actions generally do not preempt state law. Cases that have found complete preemption by ERISA of state law claims generally involve two themes: 1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and 2) the claims directly affect the relationship among the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries. *Memorial Hospital versus Northbrook Life Insurance*, 904 F2d, 236 (5th Cir. 1990). Several cases have found that the second factor is the more important one, in part because it involves an analysis of ERISA`s Section 514(a), which mandates that ERISA will not preempt a state law unless the state law "relates to" an employee benefit plan. *Barringer versus Parker Brothers*, 877 F Sapp 358, 1995. The Supreme Court has adopted a broad construction of the "relates to" language under ERISA by concluding that a state law "relates to" an employee benefit plan" if it has a connection with or reference to such plan." *Shaw versus Delta Airlines*, 463 US 85, 1983. The Court noted that it would not extend the "relates to" language beyond reasonable bounds. The Court also noted that some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a Finding that the law "relates to" the plan. *Id* at 100, n 21. The Court explained that there is a fundamental distinction between state laws that have a general application and laws that specifically refer to ERISA benefit plans. *Mackey*, 486 US at 825. In making the distinction between state laws which have a "clear connection with or reference to" ERISA plans and state laws which have a remote or tenuous connection with ERISA plans, courts must look to the objectives of the ERISA statue as a guide to the scope of the state law that Congress understood would survive. *DeBuono versus NYSA-ILA*, 117 S.CT 1747, 1997. *DeBuono*, specifically found that ERISA would preempt

claims where "the existence of a pension plan is a critical element of a state law cause of action." *Id* at 1752.

In the instant case, this Court finds that the existence and administration of the Fund is a critical element of Plaintiff's claim. Plaintiff seeks to hold the Defendants liable under state law for their decisions about the self-pay benefits and for their communications with Fund participants. Both of these activities are ERISA concerns because the duties and liabilities of the Fund fiduciaries are defined by ERISA itself.

Plaintiff is suing the Defendants because they made benefit determinations, namely that former Central Transport drivers would not be allowed to continue to self-pay into the Fund if they went to work for an affiliate of CenTra, Inc., and the relief sought by Plaintiff would require the Defendants to either change their benefit determinations or would penalize the Defendants for their failure to change them. Plaintiff's claims are clearly "related to" an ERISA plan. The existence of the Fund is the essential element in Plaintiff's complaint.

Thus, after careful review of the relevant case law, the pleadings and documentary evidence, this Court finds that allowing Plaintiff to assert its state law claims under the circumstances presented by this case would thwart the purpose of Congress in enacting ERISA.

Therefore, Summary Disposition is appropriate pursuant to MCR 2.116(C)(4) because Plaintiff's state law claims are preempted by ERISA and this Court lacks subject matter jurisdiction.

In conclusion, it is hereby ordered that Defendants Howard McDougall, Robert Baker, Arthur Bunte, Jr., R.V. Pulliam, Sr., Joe Orrie, Jerry Younger, George Westley, Ray Cash and Ronald Kubalanza's Motion for Summary Disposition pursuant to MCR 2.116(C)(4) is granted.

I'll sign the appropriate order.

* * *

CERTIFICATE OF COURT REPORTER

I, PAMELA L. VOLL, an Official Court Reporter, do hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth; that the same was later reduced to typewritten form by me, and that the foregoing transcript constitutes a true and correct transcription of my stenographic notes so taken.

/s/ PAMELA L. VOLL
Pamela L. Voll
Official Court Reporter
CSR 0195

APPENDIX G

UNITED STATES DISTRICT COURT
E.D. MICHIGAN, SOUTHERN DIVISION

[Jan. 14, 1998]

No. 97-CV-74831-DT

C.C. MID WEST, INC.,
Plaintiff-Appellant,

v.

HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA,
Defendants-Appellees.

OPINION AND ORDER TO REMAND CASE TO OAKLAND COUNTY CIRCUIT COURT

I. INTRODUCTION

On August 25, 1997, Plaintiff C.C. Mid West, .Inc., filed a Complaint against Defendants in Oakland County Circuit Court alleging claims of tortious interference with contractual relations and tortious interference with business expectancies. Specifically, Plaintiff, a trucking company, is suing nine Defendants for damages allegedly caused by threats Defendants have made relating to a pension fund in order to deter independent contractors from contracting with C.C. Mid West.

On September 22, 1997, Defendants filed a Notice of Removal stating that the Court had original jurisdiction over Plaintiff's claims under the Employee Retirement Income

Security Act ("ERISA"), 29 U.S.C. § 1132(e), because the claims asserted an action against Defendants who are fiduciaries of an employee pension benefit plan subject to that Act. Thus, Defendants claimed the case was removable pursuant to 28 U.S.C. §§ 1441 and 1446.

Plaintiff contested the removal in a Motion to Remand dated October 2, 1997, claiming that its Complaint sought relief wholly on state-law grounds and did not present a federal question. On October 10, 1997, Defendant filed a Response to Plaintiffs Motion to Remand, to which Plaintiff submitted, a Reply Brief on October. 20, 1997.

II. FACTS

Plaintiff C.C. Mid West is a trucking company based in Warren, Michigan. Defendant Howard Kubalanza, is the Executive Director of the Central States, Southeast and Southwest Areas Pension Fund, a multi-employer pension fund ("the Fund"). Defendants McDougall, Baker, Bunte, Pulliam, Orrie, Younger, Westley, and Cash are all Trustees of the Pension Fund. The Pension Fund is a multi-employer pension benefit plan that receives contributions from employers accepted for participation in the Fund and pays pension benefits to retired employees of these employers.

In the 1980's and early 1990's, Central Transport, Inc. was. a trucking company owned by a holding company called CenTra, Inc. Central Transport participated in the Fund pursuant to the terms of a participation agreement, a provision of which prohibited a participating employer from engaging in agreements to divide employees doing the same type of work into two groups, one which participates in the Fund and one which does not.

Defendants claim that in the mid-1990's the Fund became concerned that Central Transport was participating in such an arrangement. Specifically, the Fund was concerned that CenTra had allocated employees and work among its various

subsidiaries so that the employees more likely to qualify for a pension were placed in subsidiaries participating in the Fund, and the employees less likely to qualify for a pension were placed in subsidiaries not participating in the Fund.[1]

At the time of the Fund's investigation, Central Transport was one of a number of trucking company subsidiaries of CenTra. Other such subsidiaries included C.C. Mid West, a non-participating company. The Fund was allegedly concerned that CenTra was moving work and employees from Central Transport to C.C. Mid West and/or other non-participating companies.[2] In early 1997, Central Transport shutdown its operations and laid off 235 truck drivers. As employees of Central Transport, the drivers had pension contributions made to the Fund on their behalf by Central Transport. After the layoff, Defendants allegedly told the laid-off drivers that they could self pay into the fund in order to safeguard their full pension benefits. The Fund's "Self Contribution" program allows employees to make voluntary contributions to the Fund during times in which his employer is not required by the collective bargaining agreement to make contributions on his behalf (e.g., if the employee is laid

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[1] The Fund claims that such behavior places the Fund's actuarial soundness at risk, because the Fund relies upon some participants quailfying for pensions while others do not.

[2] During the investigation; the Fund received a collective bargaining agreement entered into by Central Transport and the unions which covered the 1994-1998 period and which required contributions to the Fund. The agreement provided for Central Transport to pay a higher contribution rate, which would qualify its employees for higher pensions, if the agreement were accepted by the Fund. The Fund postponed its decision until the investigation was complete. Central Transport subsequently shutdown its operations, thus making the investigation moot. The. Fund then accepted the 1994-1998 collective bargaining agreement to provide the participants immediate eligibility for the higher pension class.

off). This prevents participants from losing previously accumulated credits due to a break in service.

Plaintiff attempted to employ the services of former Central Transport employees on an owner-operator/independent contractor basis. Plaintiff entered into independent contractor agreements with some of these employees, and was actively negotiating with others. According to Defendant, C.C. Mid West wanted the independent contractors to make their own pension contributions by means of the Self-Contribution provisions of the Fund's plan. Defendants claim that, the Fund believed such contributions by employees working for an affiliate of CenTra would violate the Fund's plan and rules regarding self contributions and adverse selection. Therefore, Defendants claim Mr. Kubalanza wrote to former employees of Central Transport advising them of the acceptance of the 1994-1998 collective bargaining agreement and informing them that they would not be able to make Self-Contributions during any periods of time in which they worked for any affiliates of CenTra.

According to Plaintiff, Kubalanza's repeated communications to the, former Central Transport employees constituted threats that were calculated to force many, if not all, of the employees who had entered into owner-operator independent contracts with Plaintiff to sever those ties, since Plaintiff has no contractual connection to the Fund and does not make contributions to it. Plaintiff further claims that Defendants knew or reasonably should have known that the threat would have a chilling effect on negotiations between Plaintiff and former Central Trans-port employees.

Plaintiff filed suit in Oakland County Circuit Court, alleging tortious interference with contract and tortious interference with business expectancies. Defendants removed the case to federal court, claiming that the jurisdiction was proper under ERISA. Plaintiff now moves to remand to case to state court.

III. ANALYSIS

Federal courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. An action arises under federal law under § 1331 if the federal law creates the cause of action or "the plain-tiff's right to relief necessarily depends on the resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). As a practical matter, virtually no court permits removal on the latter basis, as courts most often require that the complaint itself actually contain a federal claim. *See*, Schwarzer, Tashima, & Wagstaffe, *Federal Civil Procedure Before Trial*, § 2:697 (1997). The fact that a state law cause of action may require reference to a federal law or raise incidental federal issues is not enough to lead to removability. *See, Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); *Smith v. Industrial Valley Title Ins. Co.*, 957 F.2d 90 (3rd Cir.1992).

A defendant may remove to federal court any civil action arising under the laws of the United States. "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant" to federal court. 28 U.S.C. § 1441(a). Whether a particular civil action arises under the laws of the United States depends on application of the "well-pleaded complaint rule." Under that rule, "a cause of action arises under federal law only when the plain-tiffs well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (citing *Gully v. First National Bank* 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

> [T]he plaintiff is the master of the complaint . . . [and] may, by eschewing claims based on federal law, choose

> to have the cause heard in state court . . . . [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one, arising under federal law, thereby selecting the forum in which the claim shall be litigated.

Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Thus, "[t]he fact that a defendant might ultimately prove that a plaintiffs claims are preempted does not establish that they are removable to federal court." *Id.* at 398.

Nevertheless, the Supreme Court has recognized some areas of federal legislation that are so comprehensive that they constructively convert state law claims that come within their scope into claims "arising under" federal law, creating a "complete preemption exception" to the well-pleaded complaint rule. *See Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). In *Metropolitan Life*, *supra*, the Supreme Court extended this exception to state law claims that fall within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a).[3]

ERISA also contains a general preemption provision. With exceptions not relevant here, it states that ERISA "shall supersede any and all State laws insofar as they may now' or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).[4] This clause "is conspicuous in its breath," *FMC Corporation v. Holliday*, 498 U.S. 52, 111 S.Ct: 403, 407, 112 L.Ed.2d 356 (1990), and has been interpreted broadly,

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[3] 29.U:S.C. 1132 is the codified section of ERISA § 502.

[4] 29 U.S.C. 1144 is the codified section of ERISA § 514.

requiring' preemption of state law "even if the law is not specifically designed to affect [an ERISA-governed plan], or the effect is only indirect." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). However, some state laws may have "too tenuous, remote, or peripheral" an effect on a benefit plan to fall within the statute's preemptive force. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

In a recent case involving removal jurisdiction, the Court of Appeals for the Sixth Circuit distinguished between two types of ERISA preemption—preemption implied by § 1132 (a), and preemption explicitly created by § 1144(a). *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir.1995) (en bane). *See also Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940 (6th Cir.1994); *Harris v. Provident Life and Acc. Ins. Co.*, 26 F.3d 930, 933-34 (9th Cir.1994); *Alexander v. Anheuser-Busch Companies, Inc.*, 990 F.2d 536, MO (10th Cir.1993). The first "preempts actions brought in state court that could have been brought under ERISA's civil enforcement section." *Alexander* at 943 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53-56, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)). The second preempts state law claims that "relate to" an ERISA governed benefit plan, but could not have been brought under ERISA's civil enforcement provision. *Warner* held that removal jurisdiction is appropriate only if a state law claim falls within the scope of ERISA's civil enforcement provision, § 1132(a)(1)(B):

> [*Metropolitan Life*] ruled that the exception [to the well-pleaded complaint rule] is narrowly limited in the ERISA context to state common law or statutory claims that fall within the ERISA civil enforcement provision of 29 U.S.C. § 1132(a)(1)(B) because "the legislative history consistently sets out this clear intention to make [§ 1132(a)(1)(B)] suits brought by participants or beneficiaries federal questions for the purpose of federal court jurisdiction . . . . " *Id.* at 66. Therefore, in order to

> come within the exception a court must conclude that the common law or statutory claim under state law should be characterized as a superseding ERISA action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," as provided in 1132(a)(1)(B).
>
> The Court specifically stated "ERISA preemption, without more, does not convert a state claim into an action arising under federal law." *Metropolitan Life*, at 64. Section 1144 falls precisely into this category. It allows ERISA to preempt state laws when they "relate to" matters governed by ERISA but does not create a federal cause of action for matters which only "relate to" ERISA's field of concern. Thus, § 1144 preemption does not create a federal cause of action itself, and cannot convert a state cause of action into a federal cause of action under the well-pleaded complaint rule. As a consequence, no removal jurisdiction exists under § 1144.

Warner at 534 (emphasis added).

Plaintiff interprets *Warner* and *Metropolitan Life* to restrict ERISA removal to civil enforcement suits that fall under 1132(a)(1)(B). (Citing *Sears v. Chrysler Corporation*, 884 F.Supp. 1125, 1129 (E.D.Mich. 1995) (citing *Warner*, 46 F.3d at 534); *Greater Lansing Ambulatory Surgery Center v. Blue Cross & Blue Shield of Michigan*, 952 F.Supp. 516, 518 (E.D.Mich.1997); *Moll v. UAW*, 911 F.Supp. 269, 272 (E.D.Mich.1996)). Several other cases also seem to support the proposition that only participants and beneficiaries can bring civil actions under ERISA. *See, e.g., Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940, 946 (6th Cir.1994) ("As previously noted, § 1132 preempts state claims by 'participants or beneficiaries' to enforce certain rights guaranteed by ERISA"); *Fugarino v. Hartford Life & Accident Insurance Co.*, 969 F.2d 178 (6th Cir. 1992) (sole

proprietor could not qualify as "participant" and his child did not qualify as a "beneficiary," and, therefore, they could sue under state law); *Sexton v. John Alden Life Insurance Co.*, 1994 WL 913331, * 5 (M.D.Ala.) ("Put another way, in order for plaintiffs state law claims to be completely preempted . . . he must be entitled to bring an ERISA claim; that is he must have been a 'participant' or 'beneficiary.' "(Citing *Dodd v. John Hancock Mutual Life Ins.*, 688 F.Supp. 564, 568 (E.D.Cal.1988))); *Madden v. Country Life Insurance Co.*, 835 F.Supp 1081, 1087 (N.D.Ill.1993) (same quote as *Sexton*;) *Kelly v. Blue Cross & Blue Shield of Rhode Island*, 814 F.Supp. 220, 231 (D.R.I. 1993) ("This Court, agreeing with the majority of courts opining on this issue, refuses to strip persons who fail to qualify as participants or beneficiaries of the right to sue for recovery arising out of a clearly established contractual relationship.").

Defendants argue that although these cases, especially *Warner* and *Metropolitan Life*, fortuitously fell under that particular provision, which is the most commonly litigated because it involves the recovery of benefits by a participant or beneficiary, removal is available for cases falling under any of the civil enforcement provisions listed in 1132(a). Defendants further argue that Plaintiff's claims are removable because they fall under subsections (2), (3), (4), (5), and (8) of § 1132(a), and under federal common law.

A. *Removability Under § 1132(a)*

The express language of ERISA confirms Defendants' contention that removal is allowed for all actions falling under 1132(a). Section 1132(f), the section which defines the scope of federal court jurisdiction, provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant relief provided for in subsection (a) of this section in any action.

This section clearly confers jurisdiction on federal courts to grant relief provided for claims under in subsection (a), not just subsection (a)(1)(B). The first recourse of statutory interpretation is the language of the statute itself, and if that language is clear and unequivocal, as it is here, no further inquiry is necessary. While the drafters of subsection (f) could have specified that jurisdiction was limited to cases arising under (a)(1)(B), they did not. Thus, the Court interprets the statute as written: to confer federal jurisdiction over cases arising under (a) generally.

The tendency of many courts to use language restricting ERISA enforcement actions to claims arising under § 1132(a)(1)(B), and to use language restricting the proper class of plaintiffs to participants and beneficiaries, is no doubt attributable to the fact that most cases arise under that section. The plaintiffs in these cases typically seek to recover benefits, enforce their rights under a plan, or clarify their future rights under a plan. In fact, nearly all of the cases cited above, including *Warner* and *Metropolitan Life*, assert claims which either fall under 1132(a)(1)(B), or resemble claims under that section. This coincidence has, understandably, caused some confusion over whether ERISA removal is allowed for claims under (a)(1)(B) or (a) generally.

However, a careful analysis of *Metropolitan Life* shows that the Supreme Court often referred to § 1132(a) generally when dealing with ERISA removal. While analogizing 1132(f) to § 301 of the Labor Management and Relations Act (the only. other statute with complete preemption), the Court stated:

> The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:
>
> > [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but

> also in State courts of competent jurisdiction. *All such actions* in Federal or State courts *are to be* regarded *as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*

Metropolitan Life, 481 U.S. at 65-66 (emphasis added). The Court went on to conclude by stating:

> *Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.* Since we have found Taylor's cause of action to be within the scope of § 502(a), we must honor the intent [of Congress] whether preemption was obvious or not at the time this suit was filed.

Metropolitan Life, 481 U.S. at 66. As the underlined portions of these statements indicates, the Court considered the removability of ERISA actions in the context of 1132(a) generally, without limiting removability to claims brought only under (a)(1)(B).

Finally, a careful analysis of *Warner* reveals that the broad language in that case is limited to (a)(1)(B) because the facts dictated as such. Mr. Warner claimed that he was wrongfully terminated because of his age, and Ford Motor Company responded that he had settled his claim as part of an agreement governing retirement benefits. Because the suit involved retirement benefits, the only part of § 1132(a) which was implicated was the section regarding claims for benefits under a plan, i.e., 1132(a)(1)(B). The same is true for *Metropolitan Life*, in which the only claim at issue arose under § 1132(a)(1)(B). Therefore, federal courts possess jurisdiction over all claims originating under 1132(a), and not just 1132(a)(1)(B).

B. *Plaintiff's Claims are not Removable*

Having ruled that all claims under the civil enforcement provisions of § 1132(a) are removable, the Court now turns to

the crux of the issue presented in this case: whether Plaintiffs claims fall under any of the provisions of § 1132(a). Defendants argue that because Plaintiffs claims stem from communications between the Fund and its participants, it is within the domain of ERISA. Defendants' arguments fail to recognize, however, that the issue of removal in this case revolves not around the relationship between Defendants and their plan participants, but rather the relationship between Plaintiff and Defendants.

Specifically, Defendants argue Plaintiffs claims fall under §§ (2), (3), (4), (5), (8), and under federal common law. The relevant portions of 1132(a) state:

> A civil action may be brought—
>
> (1) *by a participant or beneficiary*—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) *by the Secretary*, or by a participant, beneficiary or fuduciary for appropriate relief under section 1109 of this title;
>
> (3) *by a participant, beneficiary, or fiduciary* (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> (4) *by the Secretary, or by a participant, or beneficiary* for appropriate relief in the case of a violation of 1025(c) of this title; (5) except as otherwise provided in subsection (b) of this section, by the Secretary

> (A) to enjoin any act or practice which violates any provision of this subchapter or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;
>
> * * *
>
> (8) *by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title*, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; . . . .

(Emphasis added). Taken collectively, the only persons empowered to bring civil enforcement actions under the first five subsections of 1132 are the Secretary, participants, beneficiaries, and fiduciaries.[5] Section 1002 of the Act defines these parties as follows:

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or who beneficiaries may be eligible to receive any such benefit.
>
> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.
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> * * *

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[5] The reference to 1021(f)(1) is not relevant, as that section regards information necessary to comply with Medicare and Medicaid coverage data bank requirements and includes references to employers, plan administrators, insurers, third party administrators, and the like.

(13) The term "Secretary" means the Secretary of Labor.

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority. or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment, advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such terms includes any person designated under section 1105(c)(1)(B) of this title.

Plaintiff C.C. Mid West plainly does not fit within any of these categories. C.C. Mid West is not eligible to receive any benefits ("participant"), or designated by a participant to become entitled to benefits ("beneficiary"). Plaintiff is certainly not the Secretary of Labor, nor is Plaintiff someone who has discretionary authority over the plan ("fiduciary"). In fact, Plaintiff's only link to the Fund is that its new independent contractors participate in the Fund, or were' promised they could participate in the Fund. Therefore, a fair reading of the plain language of the statute indicates Plaintiffs claims do not arise under section 1132 because Plaintiff is not a party authorized to file a civil enforcement action.[6]

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[6] Furthermore, Defendants arguments based on federal common law are without merit. Defendants cite *Armistead v. Vernitron*, 944 F.2d 1287 (6th Cir.1991), which "created federal common law remedies where fiduciaries fail to communicate sufficiently or accurately to participants about eligibility requirements likely to be material to their individual circumstances." (Defendants Brief, p. 14). However, the instant case does not involve a suit between participants and fiduciaries, but rather involves a

This interpretation of which parties are empowered to bring civil suits under 1132(a) is reinforced by the Supreme Court's decision in *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct.2841, 77 L.Ed.2d 420 (1983). In that case, the California Franchise Tax Board levied against money held in trust for three union members by a welfare benefit trust seeking to collect unpaid personal income tax. The Board brought a state court action for declaratory relief and the defendant removed the case to federal court. The district court denied the plaintiffs, motion to remand and ruled on the merits of the case.

In reversing the district court and remanding the case, the Supreme Court stated:

> Under 502(a)(3)(B) of ERISA, a participant, beneficiary, or fiduciary of a plan covered by ERISA may bring a declaratory judgment action in federal court to determine whether the plan's trustees comply with a state levy on funds held in trust. Nevertheless, CLVT's argument that appellant's second cause of action arises under ERISA fails for the second reason given above. ERISA carefully enumerates the parties: entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Franchise Tax Board, 463 U.S. at 26-27. Therefore, "although a suit by the Trustees would 'arise under' federal law, [a] suit against them did not." Schwarzer, Tashima, & Wagstaffe, *Federal Civil Procedure Before Trial*, § 2:96.2 (1997). In the instant case, obviously analogous to Franchise Tax Board, the same is true—while a suit by the Trust would most

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suit between a non-participating employer and the trustees of a Fund, with which Plaintiff has no affiliation.

likely fall within one of the provisions in 1132(a), a suit against the Trust by a party not mentioned in 1132(a) should not invoke federal jurisdiction.

Consequently; both common sense and case law indicates that if Plaintiff is not a party authorized to file a civil enforcement action, its claim does not "arise under" § 1132: In *Madden v. Country Life Ins. Co.*, 835 F.Supp. 1081 (N.D.Ill. 1993), the plaintiff, a law partner, claimed that the defendant insurance company wrongfully rescinded coverage under a group health insurance policy.

The court stated that "if the court could ignore the identity of the party seeking to avail himself of the remedies sought, the remedies themselves would appear to come within the type for which Congress expressed the intent to provide the exclusive remedy under ERISA and thus to preempt." Madden, 835 F.Supp. at 1084. However, the court continued:

> The identity of the party seeking to avail himself of the remedies cannot, however, be ignored. Only if a party fits within the definitions of the parties enumerated for particular remedies under ERISA is the party entitled to invoke these remedies. *Giardono v. Jones*, 867 F.2d 409, 411-14 (7th Cir.1989). "ERISA carefully enumerates the parties entitled to relief under § 502 [29 U.S.C. § 1132]." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 27, 103 S.Ct. 2841, 2855, 77 L.Ed2d 420 (1983): "The phrasing of § 502 is instructive. Section 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief." *Id.* at 25, 103 S.Ct. at 2854.

Id. at 1085. Ultimately, the court concluded that because the law partner was not a participant or beneficiary under § 1132 (a)(1)(B), the section under which such a claim would fall, his state law claims were not preempted. "To hold otherwise would be 'to strip persons who fail to qualify as participants

or beneficiaries of the right to sue for recovery arising out of a clearly established contractual relationship. *Kelly*, 814 F.Supp. at 230-31 (listing supporting cases)." *See also*, *Romani v. Prudential Ins.*, 1994 WL 514030, *2 (N.D.Cal.) (in order for plaintiffs state law claims to be completely preempted, he must be entitled to bring an ERISA claim) (citing *Hospice of Metro Denver v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir.1991)).

Defendant never deals directly with this shortcoming, but makes an array of arguments supporting removal based on cases which are distinguishable from the instant case. First, Defendant cites *Martin v. General Motors Corporation*, 753 F.Supp. 1347 (E.D.Mich.1991), in which this Court found that removal was proper despite the fact that the plaintiff was not a participant and then dismissed the case for lack of standing to bring an action under ERISA Defendant fails to mention, however, that the plaintiff in Martin claimed to be a "participant." The Court denied his claim, concluding that "ERISA preempts state law causes of actions alike with respect to both persons who are actually 'participants' or 'beneficiaries' of employee benefit plans and persons who claim to be 'participants' or 'beneficiaries' of employee benefit plans." Martin, 753 F.Supp. at 1358. The instant case is distinguishable from Martin because Plaintiff C.C. Mid West does not claim to be a participant, or any other party entitled to bring suit.

Next, Defendant cites *Harper v. TRW*, 881 F.Supp. 294 (E.D.Mich.1995), for the proposition that the proper focus is whether the plaintiffs claims fall within an area of law where Congress has indicated an intent to completely preempt state court adjudication. (*Id.* at 296 ("If Congress intends that a federal statute 'completely preempt' an area of state law, any complaint alleging claims under that area of state law is presumed to allege a claim arising under federal law.")). Defendant claims Harper is in accord with *Romney v. Lin*, 105

F.3d 806, 812 (2nd Cir. 1997), cert. denied, __U.S.__, 118 S.Ct 263, 139 L.Ed.2d 189 (holding that a plan trustee's suit against people that ERISA's civil enforcement provisions did not identify as proper defendants was properly removed), in which the court stated:

> The "scope" question was an easy one in Metropolitan Life since the suit "by a beneficiary to recover benefits from a covered plan . . . f[ell] directly under § 502(a)(1)(B) of ERISA" *Id.* at 62-63, 107 S.Ct at 1546. Metropolitan Life thus shed little light on how far this Court might go in deeming a suit to be "within the scope" of § 502(a). That decision makes clear, how ever, that even though a suit is preempted by ERISA, it is not necessarily within federal court jurisdiction. There are thus some cases in which a state law cause of action is preempted, but only a state court has jurisdiction to so rule.
>
> * * *
>
> Plainly, this Court cannot have meant that the only suits "within the scope" are those so completely within the four corners of ERISA as to be winning ERISA, claims, since the "scope" inquiry arises only as to claims that are defeated by ERISA's pre-emption provision.

Romney, 105 F.3d at 813.

While Defendants argue that Romney court's focus was on whether the issue is of central concern to ERISA, they offer only part of the picture. The court further stated:

> We think a suit that alleges an ERISA violation can be within the scope of ERISA, even though it is directed against a defendant not liable under ERISA, and that Romney's suit is within the scope of § 502. Unlike the claim in Franchise Tax Board, where "the State's right to enforce its tax levies is not of central concern to the

> federal statute," 463 U.S. at 25-26,.103 S.Ct. at 2855, Romney's suit to collect ERISA contributions is very much of central concern to the federal statute. Moreover, whereas the Supreme Court noted that "ERISA does not provide an alternative cause of action in favor of the State to enforce its [tax] rights," *id.* at 26, 103 S.Ct. at 2855, ERISA explicitly provides such a cause of action for Romney, at least vis a vis the employer.

Romney, 105 F.3d at 813. The court's explanation reveals two important distinguishing factors. First, the issue in *Romney* was whether a suit was within the scope of ERISA despite the fact that the defendant was not liable under the statute, not whether complete preemption applied to a plaintiff not entitled to bring suit under the civil enforcement provisions of ERISA Second, in *Romney*, ERISA explicitly provided the plaintiff with a cause of action, unlike the instant cause in which the statute does not even authorize C.C. Mid West to be a plain-tiff for ERISA civil enforcement actions.

Defendants next rely upon *General American v. Castonguay*, 984 F2d 1518 (9th Cir. 1993). In Castonguay, an ERISA trust that provided health benefits to particular can dealers and their employees bought an insurance policy from the plaintiff, under which the plaintiff was to pay a portion of the claims made by the trust members, and any residual amount the trust could not pay. The insurance company covered the trust's deficiency, and sought to hold the trustees personally liable for the money. However, the court ruled that the state law claims were preempted by ERISA because ERISA al-ready regulated the trust-trustee relationship by imposing a fiduciary duty to the plan's beneficiaries, demanding they avoid certain conflicts of interest, and making them personally liable for a breach of fiduciary duty.

This case, although relied upon by Defendants, in reality better illustrates why the instant case should be remanded to

state court. The court emphasized the importance of the relationships regulated by ERISA:

> The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain relationships: for instance, the relationship between plan and. plan member, between plan and employer, and between employer and employee (to the extent an employee benefit plan is involved), and between plan: and trustee.
>
> * * *
>
> To determine whether a state law is preempted we must look at whether it encroaches on the relationships regulated. by ERISA

Castonguay, 984 F2d at 1521-1522.

Here, the relationship between Plaintiff C.C. Mid West and the Fund is not one that is regulated by ERISA. Plaintiff is an on-participating employer, who does not have any relationship whatsoever with the Fund, let alone one that is governed by the terms of ERISA As such, the relationship implicated in the instant case—between two competitors—does not fall within the purview of 1132(a).

Finally, Defendants cite *Tolton v. American Biodyne*, 48 F.3d 937 (6th Cir.1995), in which the plaintiffs sued under state law for wrongful death, medical malpractice, and other such claims, regarding the suicide of their family member. Plaintiffs later specifically amended their complaint to include a claim under ERISA The court ruled that ERISA: preempted the plaintiffs' claims, despite not providing an adequate remedy for the wrongs they alleged. *Tolton* is easily distinguishable from the instant case, however, because in *Tolton* the plaintiff alleged ERISA claims on the face of the

amended complaint, whereas Plaintiff C.C. Mid West alleged solely state claims in its complaint.

In addition to these cases, at the hearing on this matter defense counsel urged the Court to examine *Feldman v. Green*, 138 Mich.App. 360, 360 N.W.2d 881 (1984). In *Feldman*, the Michigan Court of Appeals set out the elements for a claim of tortious interference with a contractual or business relationship:

> We hold, consistently with prior rulings by the Supreme Court of this state, that one who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs contractual rights or business relationship.

Feldman, 138 Mich.App. at 369, 360 N.W.2d 881. Defendant claims that because the communication to its participants was "justified," and in fact necessary, that Plaintiff's claim requires an interpretation of federal law because the employer-participant relationship is governed by ERISA In short, Defendants argue the case should be removable to federal court because an analysis of the sufficiency of the complaint would require a court to determine whether Defendants communications were required by or consistent with ERISA and thus "justified."

However, this argument is insufficient to invoke federal jurisdiction because it is a defense, and as a defense it does not appear on the face of the well-pleaded complaint, and thus does not authorize removal to federal court. *Metropolitan Life*, 481 U.S. at 63-64 (citing *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936)). . . . Federal question jurisdiction does not exist where the complaint is based entirely on state law, even if issues of federal law will undoubtedly be raised in the defendant's

answer. *Phillips Petroleum Co. v. Texaco, Inc*, 415 U.S. 125, 128, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974). Defendants' argument is no more than an attempt to inject their defense into Plaintiffs complaint. Accordingly, Defendants' justification argument, while perhaps a valid defense, does not appear on the face of the well-pleaded complaint and, therefore, does not provide a basis for removal jurisdiction.

IV. CONCLUSION

In the final analysis, Plaintiffs claims are not removable under ERISA The complaint asserts solely state law claims, and Plaintiff would be unable to bring a civil enforcement action under § 1132(a) because Plaintiff is not a party authorized to do so under that section. ERISA simply does not regulate the relationship between C.C. Mid West and the Fund, if a relationship even exists. The Court cannot allow Defendant to inject a federal question into Plaintiffs case to trans-form the action into one arising under federal law. To allow Defendant to do so would make Plaintiff "master of nothing." *Warner*, 46 F.3d at 534.

(2)

Supreme Court, U.S.
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No. 04-1126

In the Supreme Court of the United States

HOWARD MCDOUGALL, ET AL.,
Petitioners,

v.

C.C. MID WEST, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

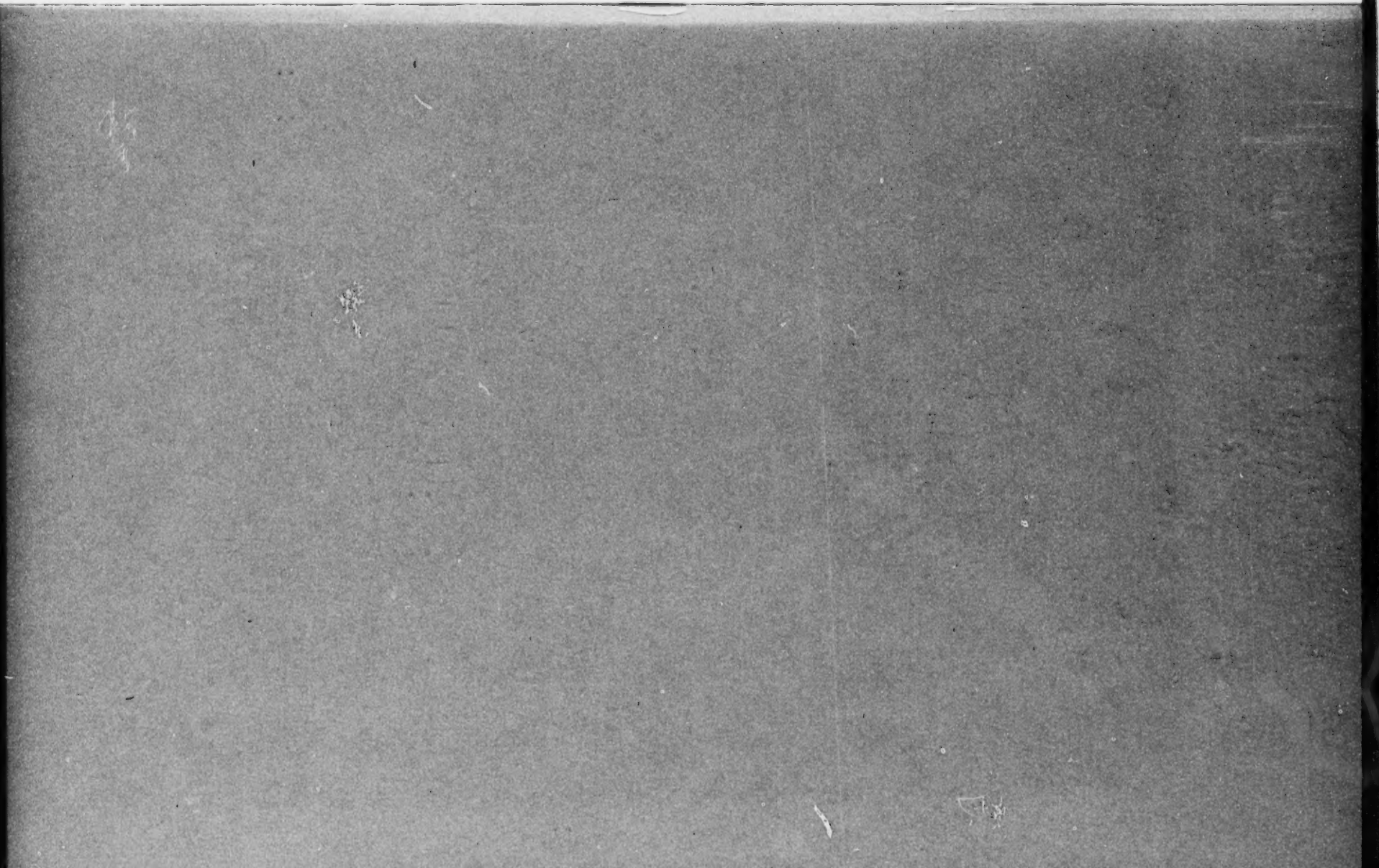
RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL F. SMITH
Counsel of Record
JOHN H. DUDLEY, JR.
BUTZEL LONG
100 BLOOMFIELD HILLS PARKWAY
SUITE 200
BLOOMFIELD HILLS, MI 48304
(248) 258-1616

K. SCOTT HAMILTON
DICKINSON WRIGHT, PLLC
500 WOODWARD AVENUE
SUITE 4000
DETROIT, MI 48226
(313) 223-3500

Counsel for Respondent

Becker Gallagher Legal Publishing, Inc., 800.890.5001



QUESTIONS PRESENTED

1. Is an interlocutory order of the Michigan Supreme Court outside this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a), where it reinstates a summarily dismissed case and remands it to the State trial court for discovery and further proceedings, and thus is not a "[f]inal judgment or decree" of the Michigan Supreme Court?

2. Did the Michigan Supreme Court properly apply *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) in holding that Petitioners at this preliminary stage of the litigation have failed to show that ERISA preempts Michigan's common law of tortious interference with contract and business expectancies, as C.C. Mid West seeks to apply it?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners Howard McDougall, Arthur H. Bunte, Jr., R.V. Pulliam, Sr., Joe Orrie, Jerry Younger, George J. Westley and Ray Cash are individuals who at all relevant times were employed either by trucking companies that competed with Respondent C.C. Mid West, Inc. ("C.C. Mid West") or by local affiliate unions of the International Brotherhood of Teamsters; each also was a trustee of the Central States, Southeast and Southwest Areas Pension Fund ("Fund"). Petitioner Estate of Robert J. Baker is the estate of the late Robert J. Baker, a deceased individual who at all relevant times was a trustee of the Fund. Petitioner Kubalanza was the Fund's administrator.

Respondent C.C. Mid West is a Michigan corporation.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

CenTra, Inc. is the parent of Central Transport International, Inc., which is the parent of C.C. Mid West, Inc. (now known as Central Transport, Inc). No publicly owned company owns 10 percent or more of the corporation's stock.

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OPINIONS BELOW

Respondent concurs with Petitioners' statement of Opinions Below, except that the June 17, 2004 Order of the Michigan Supreme Court of which Petitioners seek review is reported, at 683 N.W.2d 142 (Mich. 2004).

The November 22, 2004 Order denying reconsideration also is reported, at 688 N.W.2d 826 (Mich. 2004).

JURISDICTIONAL STATEMENT

The Michigan Supreme Court's June 17, 2004 Order is outside this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a). As an interlocutory order that remands the case for discovery and further proceedings in the Michigan trial court, it is not a "final judgment or decree," and it does not fit within any of the four exceptions to the finality requirement recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioners, Respondent references the following statutory provision in its Brief in Opposition:

28 U.S.C. § 1257(a) (2005):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty of statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question

on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised.

STATEMENT OF THE CASE

Respondent, C.C. Mid West, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Michigan Supreme Court's Order in this case, which is reported at 683 N.W.2d 142 (Mich. 2004).

C.C. Mid West is a Michigan-based trucking company, while Petitioners during the relevant period were the eight trustees and the administrator of the Central States, Southeast and Southwest Areas Pension Fund, a multi-employer pension fund commonly known as the "Teamsters' pension Fund" or "the Fund." Four of the Petitioners are former or current Teamster union officials, and four are former or current trucking industry executives affiliated with direct competitors of C.C. Mid West. C.C. Mid West has no involvement or connection with the Fund. (Complaint, Opposition, Apx.1b).

In March 1997, Central Transport, Inc., a separate transportation company that C.C. Mid West's corporate parent had sold to an unrelated party the preceding year, closed its doors and terminated approximately 235 truck drivers. (Complaint, Opposition, Apx. 1b; Excerpt of 3/28/97 General Release, Settlement and Termination Agreement (hereafter "Termination Agreement"), Opposition, Apx. 17b). Prior to going out of business, Central Transport had made pension contributions on the drivers' behalf to the Teamsters' pension Fund. After the drivers' termination,

Petitioners told them that they could self-pay into the Fund. This was of great value to the drivers, many of whom were within a few years of retirement, since it permitted them to safeguard their full pension benefits. (Complaint, Opposition, Apx. 1b). As it turned out, however, the representation that they could self-pay into the Fund was knowingly false.

As a trucking company C.C. Mid West depends heavily on owner-operator/independent contractors. In 1997 there was a severe nationwide shortage of qualified truck drivers, and C.C. Mid West began negotiating with the former Central Transport drivers in an effort to sign as many of them to contracts, on an owner-operator/independent contractor basis, as it could. C.C. Mid West entered into contracts with 59 of them and was actively negotiating with others, as well as with other owner-operators not formerly employed by Transport. (Complaint, Opposition, Apx. 1b). Upon learning of C.C. Mid West's efforts, however, Petitioners, in a deliberate effort to sabotage C.C. Mid West's business, repeatedly threatened the former Central Transport employees that they would not be allowed to self-contribute if they contracted with any company affiliated with C.C. Mid West's corporate parent, CenTra, Inc., including C.C. Mid West. (Ex. A to Complaint, Opposition, Apx. 15b). The threat was conveyed at least twice, via letter and in person at a meeting with many of the owner-operators held in Ft. Wayne, Indiana in early April 1997. It was disseminated not only to all 235 former Transport employees, but also to drivers throughout the trucking industry, and has never been retracted.

C.C. Mid West in August 1997 filed its Complaint, alleging tortious interference with contract and with business expectancies under Michigan common law. The Complaint alleged that Petitioners knew or reasonably should have known that their threats would intimidate many, if not all, of

the former Central Transport employees who had entered into contracts with C.C. Mid West into severing those ties, since C.C. Mid West is a CenTra affiliate, has no contractual connection to the Teamsters' pension Fund, and does not make pension contributions to it. Petitioners also knew or should reasonably have known that their threat would have a chilling effect on C.C. Mid West's negotiations with former Central Transport employees with whom it had not yet concluded agreements, and would deter other owner-operators throughout the industry from contracting with C.C. Mid West. (Complaint, Opposition, Apx. 1b). Anticipating that Petitioners would try to shield themselves from liability for their tortious conduct by hiding behind ERISA's general preemption provision, 29 U.S.C. § 1144(a), the Complaint explained that the threats had no lawful connection with any legitimate Fund administration, but rather constituted a malicious attempt by Petitioners to act upon their own personal animus against C.C. Mid West based on its non-union status, using as a weapon the illusory threat of disallowing self-payment. (Complaint, Opposition, Apx. 9b, 11b). Indeed, as C.C. Mid West later learned, at the time they issued the threats, Petitioners knew that the owner-operators would not be permitted to self-pay under any circumstances, as discussed below. The threat had its intended effects: Many owner-operators stopped driving for C.C. Mid West and took their trucks elsewhere, and the company has been seriously damaged as a direct result.

Consistent with its obligations under Supreme Court Rule 15.2, C.C. Mid West notes that the Petition for Writ of Certiorari contains numerous misstatements and mischaracterizations of fact. It repeatedly frames C.C. Mid West's allegations in ERISA terminology, asserting that C.C. Mid West "challenged the fiduciaries' 'refusal to accept self-contributions from owner-operators,'" (Petition, 5, citing

Complaint ¶ 30), and that "[t]he thrust of [C.C. Mid West]'s allegations is that the Defendant plan fiduciaries tortiously interfered...when the fiduciaries communicated their benefit determination that the layed [*sic*] off employees/plan participants would not be eligible under the plan to make pension self-contributions if they returned to active employment...." (Petition, 5). The "thrust" of the Complaint has nothing to do with a benefit-plan interpretation by fiduciaries or communication of it to plan participants. Rather it alleges, consistent with Michigan's common law of tortious interference, that Petitioners' actions were per se wrongful and/or done with malice and unjustified in the law, undertaken for the purpose of injuring C.C. Mid West as a trucking business. (Complaint, Opposition, Apx. 8b-12b). *See Mino v. Clio School Dist.*, 661 N.W.2d 586 (Mich. Ct. App.), *leave denied*, 669 N.W.2d 815 (Mich. 2003), *and reconsideration denied*, 677 N.W.2d 23 (Mich. 2004).

Elsewhere, Petitioners assert that "the pleadings themselves make clear that the basis of the claim is a benefit plan interpretation by plan fiduciaries and the communication of that interpretation to plan participants." (Petition, 9). But the Complaint does <u>not</u> challenge "fiduciaries' refusal to accept self-contributions," rather it challenges Petitioners' tortious attempt to drive owner-operators away from C.C. Mid West. (Complaint, Opposition, Apx. 1b).[1] To the extent (if any) that this case implicates issues relating to "benefit plan interpretation by plan fiduciaries and the communication of that interpretation to plan participants," it is solely because

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[1] Petitioners' reference to "the pleadings" (plural) is itself curious, since at the time the Michigan Supreme Court entered its Order in June 2004, they still had not filed an Answer to the 1997 Complaint. Eventually they answered in late 2004, after C.C. Mid West initiated proceedings to default them.

Petitioners have tried to inject those issues into the case in an attempt to evade liability via use of ERISA preemption.

Evidence that C.C. Mid West submitted below and which was central to the Michigan Supreme Court's Order – but about which the Petition is entirely silent – shows that Petitioners have invoked ERISA preemption improperly. C.C. Mid West in the trial court submitted the shutdown agreement that Central Transport had negotiated with the union representing its employees, demonstrating that the employees were terminated – not laid off – when that company closed. (Termination Agreement Excerpt, Opposition, Apx. 18b). C.C. Mid West also submitted sworn deposition testimony from the Fund's general counsel, given in another lawsuit, showing that Petitioners, at the time they were dangling the right to self-pay before the owner-operators in an effort to drive them away from C.C. Mid West, knew or should have known that the owner-operators would be unable, under <u>any</u> circumstances, to self-pay into the fund if they had been terminated (as opposed to laid off) by Central Transport. (Nyhan Dep., Opposition, Apx. 19b). This evidence exposes as pretextual and false Petitioners' claim that they were simply communicating about a "benefit determination," since there was no benefit determination to make: the drivers had been terminated by Central Transport, and thus could not self-pay.

After the Michigan Court of Appeals in 2002 affirmed summary disposition on an alternate basis not ruled on below, the Michigan Supreme Court vacated that ruling and remanded the case to the Court of Appeals with instructions to decide the ERISA preemption question. On remand, the Michigan Court of Appeals held that ERISA preempted C.C. Mid West's claims. The Michigan Supreme Court granted C.C. Mid West leave to appeal, and after full briefing and

argument, on June 17, 2004 entered its Order reinstating this case and remanding it to the Michigan trial court "for further development of the factual record through discovery or, if appropriate, for amendment of the pleadings." (Petition, Apx. 3a-4a).

Proceedings in the Michigan trial court since that time bear directly on the lack of this Court's certiorari jurisdiction, since they show that the Order is not a "final judgment or decree." C.C. Mid West has served written discovery that Petitioners have partially answered, and the trial court currently has pending before it C.C. Mid West's motion to compel discovery, which the parties as of this writing are attempting to resolve without further court intervention. Additionally, Petitioners on February 7, 2005, filed a renewed motion for summary disposition in the Michigan trial court, based on ERISA preemption. (Motion, Opposition, Apx. 31b). The motion is largely a repackaged version of their 1998 motion, and is accompanied by the affidavit of Thomas Nyhan, the Fund's general counsel in 1997 and its current administrator. Nyhan, who is not a defendant in this action, purports to relate the state of mind of each Petitioner during the events in question in 1997, i.e. that they were motivated not by tortious motives but rather by a wish to carry out their fiduciary duties under ERISA with regard to Fund administration. As of this writing Petitioners' renewed motion remains pending before the Michigan trial court; a hearing date has not been set.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Michigan Supreme Court's Order is an Interlocutory One That Remands the Case for Further Proceedings in the State Trial Court, and Thus Is Not a "Final Judgment or Decree" as Required By 28 U.S.C. § 1257(a).

This Court's certiorari jurisdiction over a decision of a State's highest court is governed by 28 U.S.C. § 1257(a), which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari...where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.... [28 U.S.C. § 1257(a)].

The statute establishes a "firm" final-judgment rule:

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." [*Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Market Street R. Co. v. R.R. Comm'n of California*, 324 U.S. 548, 551 (1945))].

The Order that Petitioners seek to have reviewed plainly is interlocutory, and in no way "final as an effective determination of the litigation." It vacates the grant of summary disposition (summary judgment) that had been entered by the Michigan trial court in 1998 and affirmed by the Michigan Court of Appeals, reinstates the case and remands it back to the Michigan trial court "for further development of the factual record through discovery or, if appropriate, for amendment of the pleadings." (Petition, Apx. 3a-4a). The Order notes that while Petitioners' claims "in the abstract" may be related to their duties as pension-fund trustees, "further factual development may show that they were not." (Petition, Apx. 4a). It relates the Michigan Supreme Court's belief that "further factual development will assist the [trial] court in this matter," and expressly remands the case for that factual development. (*Id*). Most important for these purposes, the Michigan Supreme Court expressly declined to endorse a particular definition of "relates to" for purposes of 29 U.S.C. § 1144(a), and specifically remanded the case to the trial court for discovery and development of various matters that "may be a threshold issue" bearing on whether or not ERISA preemption applies. (*Id*). As with the Alabama Supreme Court decision in *City of Tarrant*, which remanded the case back to the State trial court for further proceedings, the Order *sub judice* is "avowedly interlocutory," because "[a]bsent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims." 522 U.S. at 81; *see also O'Dell v. Espinoza*, 456 U.S. 430 (1982) (writ of certiorari dismissed for lack of jurisdiction since Colorado Supreme Court order remanded the case for trial, and thus was not final "as an effective determination of the litigation" nor within any exception to finality requirement); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 631-32 (1981) (California appellate court decision that remanded the

case to State trial court for resolution of factual disputes was not "final" judgment; appeal dismissed for lack of jurisdiction).

Indeed, under Petitioners' own theory the Michigan Supreme Court Order does not meet the first requirement of finality – that it "be subject to no further review or correction in any other state tribunal" – because, in their own view, it does not finally resolve the Federal issue in the Michigan courts. Petitioners' renewed motion for summary disposition, now pending in the State trial court, is premised on the assumption that the Michigan Supreme Court's Order has not finally decided the Federal question in this case: the motion is based on precisely the same ERISA preemption grounds Petitioners originally asserted in 1998. As the motion states:

> Under these circumstances, the application of state law urged by Plaintiff C.C. Mid West not only "relates to" an employee benefit plan – the minimum requirement for federal preemption under ERISA Section 514(a), 29 U.S.C. § 1144(a) – but actually *conflicts* with the obligations imposed by ERISA. There, it is clear that Plaintiff's claims are preempted by ERISA. (Motion, Opposition, Apx. 34b)(emphasis in original).

This Court in *Cox, supra,* recognized four exceptions to the finality rule, but none apply here because each requires the State-court ruling to have "finally decided" the Federal issue. 420 U.S. at 479-85. Petitioners can hardly assert to this Court that the Michigan Supreme Court's Order "finally decides" the ERISA preemption issue in this case, where they

are simultaneously litigating that very issue in the Michigan trial court.[2]

The finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *City of Tarrant*, 522 U.S. at 81 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Petitioners' failure to satisfy that rule, or any of its recognized exceptions, should result in denial of their Petition.

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[2] As their pending motion for summary disposition demonstrates, Petitioners plainly regard the Order as "subject to further review or correction" by the Michigan courts. That is one of the things that distinguishes this case from *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), an example of *Cox's* fourth category of finality exceptions. *See* STERN & GRESSMAN, SUPREME COURT PRACTICE, at 154 (8th ed. 2002). In *McClendon*, this Court granted certiorari to review a Texas Supreme Court ruling that ERISA did not preempt a State-law wrongful-discharge cause of action allowing plaintiff to recover if he could establish that "the principal reason for his termination" was his employer's desire to avoid contributing to, or paying benefits from, a pension fund. The Texas court's ruling was the last word on the Federal issue, since it ruled conclusively that ERISA did not preempt the claim, and no subsequent Texas court could possibly rule to the contrary. Here, however, Petitioners maintain that the Michigan Supreme Court's Order is *not* the final word on whether ERISA preempts C.C. Mid West's claims, even in the Michigan court system – as shown by their filing of a renewed motion for summary disposition based on ERISA preemption. (Motion, Opposition, Apx. 31b).

This Court previously has cautioned against an expansive reading of the fourth *Cox* exception, noting that application of it in the absence of a final judgment that adversely affects an important Federal interest "would permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981).

II. The Michigan Supreme Court's Order Is Fully Consistent With This Court's ERISA Preemption Jurisprudence and Reflects Uniformity Among the Federal Circuit Courts of Appeals, Not a Split.

Review on a writ of certiorari is not a matter of right but of judicial discretion, and will be granted only for compelling reasons. Supreme Court Rule 10. In addition to their failure to meet the statutory finality requirement, Petitioners present no "compelling reasons" for this Court to grant certiorari.

A. The Order Is Consistent With This Court's Current ERISA Preemption Jurisprudence.

Petitioners assert that the Michigan Supreme Court's Order conflicts with *Aetna Health, Inc. v. Davila*, __ U.S. __; 124 S. Ct. 2488 (2004), but it does not. *Aetna Health* involved "complete preemption" under ERISA § 502(a), 29 U.S.C. § 1132(a), for purposes of removal jurisdiction, and not defensive use of ERISA's general or "relate to" preemption provision, § 504(a), 29 U.S.C. § 1144(a), which this case involves. The inapplicability of "complete preemption" to this case was resolved in 1998, when Judge Rosen of the Eastern District of Michigan held that, because C.C. Mid West is an outsider to ERISA's regulatory framework and does not seek relief that could be recovered under ERISA, "complete preemption" did not provide Petitioners with removal jurisdiction. *C.C. Mid West v. McDougall*, 990 F. Supp. 914, 920-24 (E.D. Mich. 1998). Petitioners even conceded at oral argument before the Michigan Supreme Court in April 2004 that this case did not implicate "complete preemption" under § 502(a), and changed their theory only when *Aetna Health* came down four days after the Michigan Supreme Court issued its Order. But

Aetna Health has nothing to do with the issue this case presents.

In *Aetna Health*, ERISA plan participants brought claims against the administrators of their ERISA-governed benefit plans arising directly out of defendants' decisions not to provide coverage for treatment and services recommended by their doctors. Plaintiffs alleged that defendants' actions violated a Texas statute imposing a duty to exercise ordinary care in the handling of coverage decisions, but this Court had little difficulty in finding those State-law claims completely preempted by ERISA and thus removable to Federal court: Though couched in the language of State law, the claims were plainly for denial of coverage promised under terms of an ERISA-governed plan, and involved no violation of any legal duty independent of ERISA. *Aetna Health*, 124 S. Ct. at 2498 & n.4. As this Court noted, plaintiffs

> ...bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA. We hold that [plaintiffs'] state causes of action fall "within the scope of" ERISA § 502(a)(1)(B), *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987). [*Id.* at 2498].

Aetna Health sheds no light on the issue of preemption under ERISA § 514(a) as a defense to liability, and were it not for the temporal coincidence of it having been issued four days after the Michigan Supreme Court's Order, Petitioners doubtless would not even cite it. [3]

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[3] Petitioners attempt to rely on footnote 4 of *Aetna Health*, in which this Court noted that a State cause of action is preempted where it "provides an alternative remedy to those provided by the ERISA

The Michigan Supreme Court's Order in fact stands as a straightforward and faithful application of the ERISA § 514(a) preemption principles set forth in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988). In *Mackey*, this Court noted that "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, *or even torts* committed by an ERISA plan – are relatively commonplace [and] although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA § 514(a)" (emphasis added)(citations omitted). Significantly, that statement came even before the "sea change" in ERISA preemption jurisprudence ushered in 10 years ago by this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), and shows that even during the heyday of ERISA's preemptive sweep, this Court recognized Congress's intent to leave untouched claims brought by entities that are outside of ERISA's complex and reticulated enforcement structure.

The argument advanced by Petitioners in this case also could be offered in opposition to any of the "run-of-the-mill" claims listed in *Mackey* – i.e. that fiduciary duties owed to an ERISA plan and its participants required the breaking of a lease, the non-payment of a creditor, the commission of a tort, etc. But *Mackey* teaches that ERISA does not preempt such State-law claims. C.C. Mid West, an outsider to ERISA's regulatory framework, seeks money damages for harm that was inflicted on it by Petitioners, in violation of Michigan

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civil enforcement mechanism." But that founders on the indisputable fact that ERISA provides C.C. Mid West with no remedy whatsoever for the harm Petitioners have inflicted on it – as Judge Rosen correctly noted in 1998. *C.C. Mid West*, 990 F. Supp. at 920-24.

common law. This case involves simply the same sort of run-of-the-mill tort claim as in *Mackey*, and in fact is even less intrusive of ERISA's regulatory scheme than those discussed in *Mackey*, since it is not brought against the Fund itself.

The Petition for Writ of Certioriari is based on a subtle, yet critical, mischaracterization of the nature of this case. Petitioners repeatedly assert that C.C. Mid West's State-law tort claims require an interpretation of the ERISA-governed Fund and Petitioners' actions in administering it. *See, e.g.* Petition, p. 8 ("...resolution of *the claim* is dependent upon both the interpretation of the terms of the plan and the administration of the plan" (emphasis added); *Id.* at 9 ("...the pleadings themselves make clear that the basis *of the claim* is a benefit plan interpretation by plan fiduciaries....")(emphasis added). But C.C. Mid West's *claims* – that Petitioners set out to inflict economic damage upon it, based on each one's union-related or competitive animus toward C.C. Mid West and its corporate parent – have nothing to do with the Fund, and require no proof relating to the Fund in order for C.C. Mid West to prevail at trial. Rather, to the extent that issues of "plan interpretation," "communication of that interpretation to plan participants" and other such issues are present in the case, it is only because Petitioners have injected them as a defense to liability – as Judge Rosen noted more than seven years ago:

> ...Defendants argue the case should be removable to federal court because an analysis of the sufficiency of the complaint would require a court to determine whether Defendants' communications were required by or consistent with ERISA and thus 'justified.'

However, this argument is insufficient to invoked federal jurisdiction *because it is a defense....*" [*C.C. Mid West*, 990 F. Supp. at 924 (emphasis added)].

Petitioners are flatly incorrect in stating that C.C. Mid West's claim necessarily requires examination of plan terms. Their *defense* may implicate the Fund, but C.C. Mid West's claim does not. "The Court cannot allow Defendant to inject a federal question into Plaintiff's case to transform the action into one arising under federal law." *Id.*

Even with regard to claims brought by ERISA-governed entities – which is not this case, involving simple "run-of-the-mill state-law claims" brought by ERISA outsiders, of the type noted in *Mackey* – this Court's preemption analysis has undergone a sweeping constriction in the past decade. Beginning with its 1995 decision in *Travelers* this Court scaled back § 514(a) preemption dramatically, noting that the terms "relate to" and "connection with" are "unhelpful" in determining the limits of ERISA's preemptive powers. *Travelers*, 514 U.S. at 656. In fact, this Court has all but consigned its earlier attempts to construe the term "relate to" to the judicial scrap heap, noting unanimously in *Travelers* that

> ...[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for 'really, universally, relations stop nowhere'. . .we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here" [*Id.* (internal citation omitted)].

As Justice Scalia noted in concurrence in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), "[t]he statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended – which it is not." *Id.* at 335-36 (Scalia, J., concurring). Notably, all but a handful of the cases cited in the Petition predate this sea change.

Post-*Travelers*, proper ERISA preemption analysis, even where plaintiff is an ERISA-governed entity, begins with the recognition that § 514(a) is not intended to modify "the starting presumption that Congress does not intend to supplant state law." *Travelers*, 514 U.S. at 654-55; 115 S. Ct. at 1676 (citation omitted); *see also, DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813-14 (1997). Section 514(a) is not read to preempt all State-law claims that can simply be said to "relate to" an ERISA plan, which the Michigan Supreme Court's Order correctly recognized. (Petition, Apx. 4a). Under current analysis, a State-law claim brought by an ERISA-governed entity "relates to" an ERISA plan and is thus preempted only if it has "a connection with" or "reference to" the plan. *Travelers*, 514 U.S. at 656 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983); *Dillingham Constr.*, 519 U.S. at 324). Post-*Travelers*, § 514(a) has been construed to preempt in only two instances: where the State law in question either 1) mandates employee benefit structures or their administration, or 2) provides an "alternative enforcement mechanism" for ERISA benefits. *See Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 981-84 (9th Cir. 2001)(citing *Travelers* and other cases). Michigan's common law of tortious interference, as asserted by C.C. Mid West in this lawsuit, does neither.

Further, long before *Travelers*, this Court recognized that "where Congress legislates in a field which the States have traditionally occupied...we start with the assumption that the historic police powers of the States are not to be ousted by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Dillingham Constr.*, 519 U.S. at 325 (citing *Travelers* and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added)). The party advocating preemption in such historically State-regulated areas bears a "considerable burden" in overcoming that presumption. *DeBuono*, 520 U.S. at 814 (citing *Travelers*, 514 U.S. at 654). It is beyond dispute that common-law tort liability is an area of traditional State regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (there is a "long tradition of state concern with the compensation of victims of negligently, recklessly, or intentionally inflicted injury"); *see also Coyne & Delany v. Selman*, 98 F.3d 1457, 1467 (4th Cir. 1996). The Michigan Supreme Court's Order, holding that Petitioners have failed to carry their burden at this point of the litigation, falls well within these settled boundaries.

Petitioners err when they complain that the Order "improperly imposes the burden of 'factual development' in a state court proceeding upon ERISA plans." (Petition, 9). The Order has imposed nothing upon any "ERISA plan" since no plan is a party to this action, and if there has been any imposition, it is due to Petitioners' own tactical choice in asserting an ERISA-preemption defense. Petitioners' evident view that they can immunize themselves from liability for any and all misconduct merely by claiming that the challenged action occurred in connection with their administration of the Fund, is simply not consistent with the current state of ERISA preemption case law.

B. The Order Creates No Conflict with Any Federal Circuit Court.

The Michigan Supreme Court's Order does not create a split with any Federal Circuit, and is entirely consistent with decisions from Circuits across the nation that have refused to preempt similar State common-law claims – in some instances, even when the plaintiff, unlike C.C. Mid West, was an ERISA entity. *See Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181 (4th Cir. 2002) (no preemption where plaintiff alleged "improper conduct so unrelated to the plan that it cannot be termed 'plan administration' of any sort"); *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, __ F.3d __ (6th Cir. 2005) (State-law claims by employer against third-party record-keeper for ERISA-governed ESOP not preempted, where claims will not mandate a specific benefit structure, provide an alternate enforcement mechanism to ERISA or implicate relations among traditional ERISA entities); *Trustees of the AFTRA Health Fund v. Biondi*, 303 F.3d 765 (7th Cir. 2002) (common-law fraud claim brought against ERISA plan participant who fraudulently misrepresented marital status in order to collect benefits under plan was not preempted); *Dishman,* 269 F.3d at 984 (ERISA does not provide fiduciaries "with blanket immunity from garden variety torts which only peripherally impact daily plan administration"). Because there is no split between the Michigan Supreme Court and any of the Circuits, certiorari under Supreme Court Rule 10(b) is not warranted.

The clear trend among the Circuits is not to apply ERISA preemption against State-law claims where one of the parties is outside ERISA's regulatory framework. In *Dishman*, *supra*, a recipient of disability benefits from an ERISA-governed plan brought various ERISA claims against the Plan administrator, as well as a State-law invasion-of-privacy

claim, after his benefits were suspended following a private investigation that the administrator had ordered. The 9th Circuit found the State claim not preempted because California privacy law "by no stretch of the imagination" mandates certain employee benefit structures or their administration, and because holding plan administrators liable for the offensive conduct of their investigators "cannot be said to interfere with nationally uniform plan administration in the manner or to the extent" to warrant preemption. The court noted:

> The fact that the conduct at issue allegedly occurred "in the course of UNUM's administration of the plan" does not create a relationship sufficient to warrant preemption. If that were the case, a plan administrator could "investigate" a claim in all manner of tortious ways with impunity. What if one of UNUM's investigators had accidentally rear-ended Dishman's car while surveilling him? Would the fact that the surveillance was intended to shed light on his claim shield UNUM and the investigator from liability? What if UNUM had tapped Dishman's phone, put a tracer on his car, or trained a video camera into his bedroom in an effort to obtain information? Must that be tolerated simply because it is done purportedly in furtherance of plan administration? To ask the question is to answer it. Though there is clearly some relationship between the conduct alleged and the administration of the plan, it is not enough of a relationship to warrant preemption. We are certain that the objective of Congress in crafting Section 1144(a) was not to provide ERISA administrators with blanket immunity from garden variety torts which only peripherally impact daily plan administration. [*Dishman*, 269 F.3d at 984].

Dishman teaches that even where an ERISA administrator's misconduct arises directly from Plan administration, it may still be of a type that Congress simply did not intend to protect with blanket immunity from State common-law tort liability. This vitiates Petitioners' attempt to hide behind ERISA preemption by claiming that they were simply "communicating with plan participants" while administering their pension plan.

The Michigan Supreme Court's Order also is consistent with the Fourth Circuit's ruling in *Darcangelo*. In that case plaintiff brought various State-law tort and statutory claims, as well as breach of contract claims, against her employer, Verizon, and the administrator of its ERISA-governed disability plan, CORE. Plaintiff alleged that CORE improperly disseminated her private medical information to Verizon to help establish that she was a "direct threat" to her co-workers, so she could be fired without violating the Americans with Disabilities Act. *Darcangelo*, 292 F.3d at 187-88. CORE argued that the claims were preempted because they went to the heart of its ERISA fiduciary duties to handle medical and mental-health information obtained in its capacity as administrator of Verizon's employee welfare plans. *Id.* at 188. The district court agreed and found plaintiff's four common-law tort and statutory claims preempted by ERISA, but the 4th Circuit reversed, noting that post-*Travelers*, preemption is appropriate in only three basic categories of State law:

> (1) laws that mandate employee benefit structures or their administration, (2) laws that bind employers or plan administrators to particular choices or preclude uniform administrative practices, and (3) laws that provide an alternative enforcement mechanisms to ERISA's civil-enforcement provisions. [*Id.* at 190

(citing *Travelers*, 514 U.S. at 658-59; *Coyne & Delany, supra*, 98 F.3d at 1468)].

The court analyzed plaintiff's common-law and statutory claims under each: They were not based on State laws that "mandate employee benefit structures or their administration," since none dictate the terms of a plan or the type of benefits it may provide, or impose reporting, disclosure or funding requirements, or affect benefit calculations. *Id.*, citing *Coyne & Delany*, 98 F.3d at 1471. They were not based on any State law that would bind the plan administrator to a particular choice, because plaintiff "alleges conduct that is entirely outside the scope of plan administration [and] does not make any claim for relief that would regulate the structure or process of plan administration." *Id.* Finally, the common-law tort and statutory bases for plaintiff's action did not constitute alternative enforcement mechanisms for ERISA claims. *Id.* at 190-94.

The same analysis supports the Michigan Supreme Court's determination that Petitioners to date have failed to carry their heavy burden of showing that C.C. Mid West's claims are preempted. Michigan tortious-interference law neither dictates the terms of the Plan nor the benefits it may provide, nor does it impose reporting, disclosure or funding requirements. It does not bind Plan administrators to a particular choice: as in *Darcangelo*, C.C. Mid West's Complaint "alleges conduct that is entirely outside the scope of plan administration," i.e. advancement of defendants' personal interests at the expense of C.C. Mid West. Finally, with regard to the third category of preemption cases, it has already been settled that C.C. Mid West's claims are not disguised ERISA claims: C.C. Mid West is not an ERISA entity and cannot possibly bring an ERISA claim. *C.C. Mid West*, 990 F. Supp. at 920-21.

In *Penny/Ohlmann/Nieman, Inc., supra*, the Sixth Circuit adhered to the same view. Faced with State-law breach-of-contract and negligent misrepresentation claims brought by plaintiff, PONI, against both NCB – a bank that administered various of plaintiff's ERISA-governed plans – and MVP, a third-party record-keeper for one of the plans, the Sixth Circuit drew the same distinction as the other courts. While the claims against NCB were preempted since both PONI and NCB were ERISA entities, the State-law claims against MVP were *not* preempted, even where they related directly to MVP's conduct with regard to the ERISA-governed employee stock-ownership plan: MVP was not an ERISA entity, plaintiff's claims would not affect the structure, administration or benefits of the plan, and plaintiff neither asserted any rights under, nor attempted to enforce, plan terms. *Penny/Ohlmann/Nieman, Inc.*, __ F.3d at __.

In trying to show a Circuit split, Petitioners incorrectly portray *Garren v. John Hancock Mutual Life Insurance Co.*, 114 F.3d 186 (11th Cir. 1997) as holding that State-law claims "such as the claims raised by C.C. Mid West in this case" are preempted "precisely *because* they require an inquiry into benefit decisions and decisions and communications made by plan administrators." (Petition, 9-10) (emphasis in original). But the claims in *Garren* "clearly involved a traditional ERISA action – a refusal to pay benefits." *Commodities Specialists Co. v. Brummet*, No. 02-1459, 2002 U.S. Dist. Lexis 25399, at *15 & n.5 (D. Minn. 2002) (rejecting *Garren* as inapposite to issue of whether ERISA preempts action for employee's breach of non-compete agreement). C.C. Mid West does not seek Plan benefits, and as an outsider to ERISA's enforcement scheme in general, and Petitioners' Fund in particular, it cannot.

Petitioners' other case, *Mayeaux v. Louisiana Health Service & Indemnity Co.*, 376 F.3d 420 (5th Cir. 2004), is even less applicable. In *Mayeaux*, the 5th Circuit held preempted a doctor's common-law claims relating to an ERISA plan's denial of coverage for certain types of claims – causes of action clearly provided for in ERISA, and thus preempted by it. Had C.C. Mid West tried to stand in the shoes of the owner-operators who received Petitioners' threats and sue on their behalf, *Mayeaux* would provide a basis for preemption. In this case, though, it does not.

Far from presenting a split with any of the Federal circuit courts, the Michigan Supreme Court's Order is in accord with the overwhelming trend among the Circuits. Preemption does not apply where the claim at issue is brought by an ERISA outsider or does not seek relief available under ERISA – both of which are the case here. Certiorari under Supreme Court Rule 10(b) is not warranted.

CONCLUSION

The Michigan Supreme Court's June 17, 2004 Order is not a "[f]inal judgment or decree" of that court, and is outside this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a). Even if that were not the case, the Petition for a Writ of Certiorari raises none of the "compelling reasons" for review by this Court set forth in Supreme Court Rule 10, and should be denied.

Respectfully submitted,

Michael F. Smith
Counsel of Record
John H. Dudley, Jr.
Butzel Long
100 Bloomfield Hills Parkway
Suite 200
Bloomfield Hills, Michigan 48304
(248) 258-1616

K. Scott Hamilton
Dickinson Wright, PLLC
500 Woodward Avenue
Suite 4000
Detroit, Michigan 48226
(313) 223-3500

Counsel for Respondent,
C.C. Mid West, Inc.

APPENDIX 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

C.C. MID WEST, INC., a Michigan corporation, Plaintiff,	)
v.	)
HOWARD McDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA, individuals, jointly and severally, Defendants.	)

BUTZEL LONG

By: Robert J. Battista (P10540)
Michael F. Smith (P49472)
150 W. Jefferson, Suite 900
Detroit, MI 48226-4430
(313) 225-7000
Attorneys for Plaintiff

DOMINA LAW, P.C.

By: David A. Domina # 11043
Gina L. Schaecher # 20299
1065 North 115th Street, Suite 150
Omaha, Nebraska 68154-0697
(402) 493-4100
Co-counsel for Plaintiff

COMPLAINT

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge.

/s/
Attorney of Record

Plaintiff C.C. MID WEST, INC. ("C.C. MID WEST"), through its attorneys, BUTZEL LONG, and DOMINA LAW, complains of Defendants as follows:

PARTIES

1. Plaintiff, C.C. MID WEST, INC., is a Michigan corporation with its principal place of business in Michigan.

2. The following Defendants are individuals, and reside in the locations specified:

Howard McDougall
Troy, Michigan

Joe Orrie
Bloomington, Minnesota

Robert J. Baker
Wheaton, Illinois

Jerry Younger
Omaha, Nebraska

Arthur H. Bunte, Jr.
Washington D.C.

George J. Westley
New Orleans, Louisiana

R. V. Pulliam, Sr.
Nashville, Tennessee

Ray Cash
Lake Placid, Florida

Howard J. Kubalanza
Rosemont, Illinois

3. Defendants McDougall, Baker, Bunte, Pulliam, Orrie, Younger, Westley and Cash are Trustees of the Central States, Southeast and Southwest Regions Pension Fund ("the Pension Fund").

4. Defendant Kubalanza is the Executive Director of the Pension Fund, and at all relevant times acted as the agent and

representative of the other Defendants, with their authority and on their behalf.

5. The Defendants are being sued as individuals for the acts hereinafter alleged.

VENUE AND JURISDICTION

6. Venue is proper in Oakland County, Michigan, pursuant to MCL 600.1629 and 1621.

7. The amount in controversy exceeds $10,000 exclusive of interest and costs.

GENERAL ALLEGATIONS

8. Plaintiff C.C. MID WEST is a trucking operation and wholly-owned subsidiary of CenTra, Inc.

9. CenTra, Inc., formerly owned Central Transport, Inc. ("Transport"), a separate trucking operation that it sold in 1996.

10. At the time of Transport's sale, approximately 235 truck drivers who owned and operated their own trucking equipment were employed by Transport as employees ("the Transport owner-operators"), under terms of collective bargaining agreements between Transport and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and their affiliated local unions (collectively, "the Teamsters").

11. Many of the Transport owner-operators live and/or operate their businesses in Michigan.

12. Sometime after Transport was sold, it initiated negotiations with the Teamsters over Transport's desire to cease operations and the effects thereof. Transport and the Teamsters negotiated and mutually agreed to a severance package that provided the Transport owner-operators with 60 days' notice of the shutdown, and severance payments totaling $4.6 million.

13. The Pension Fund is a multi-employer pension trust that provides pension benefits to individual Teamsters on whose behalf contributions to the Pension Fund are made, pursuant to collective bargaining agreements negotiated between various employers and the Teamsters.

14. Defendants McDougall, Baker, Bunte, Pulliam, Orrie, Younger, Westley and Cash oversee the Pension Fund. Defendant Kubalanza is responsible for conducting day-to-day operations of the Pension Fund.

15. At all relevant times, Defendant Kubalanza acted at the direction of, and/or with the knowledge, consent and/or authority of the other Defendants. Defendant Kubalanza's acts are imputed to the other Defendants, and all Defendants are jointly and severally liable for the acts and omissions herein alleged.

16. When Transport employed the owner-operators it made contributions to the Pension Fund on their behalf. Following the owner-operators' termination from employment by Transport, Defendants agreed to permit the owner-operators to make self-contributions into the Pension Fund for a period of up to five years.

17. Transport was a common carrier that utilized owner-operators as employees to move freight both interstate and

intrastate. Plaintiff C.C. MID WEST is a common carrier that utilizes the services of owner-operators as independent contractors to move freight both interstate and intrastate.

18. After Transport ceased operations, Plaintiff C.C. MID WEST contacted Transport owner-operators and offered to negotiate and ultimately enter into independent contractor agreements in which Plaintiff C.C. MID WEST would purchase from them their services.

19. Plaintiff C.C. MID WEST in fact concluded independent contractual agreements with 59 owner-operators formerly employed by Transport.

20. In an intentional and deliberate effort to deny Plaintiff C.C. MID WEST the services of any owner-operator, and with the intent thereby to injure Plaintiff C.C. MID WEST's business operations, Defendants threatened the former Transport owner-operators that any owner-operator who performed work for any company affiliated with CenTra, Inc. would be forbidden from making self-contributions to the Pension Fund.

21. The ability to make self-contributions to the Pension Fund, thereby ensuring pension income, is a thing of value to owner-operators.

22. All Defendants knew or reasonably should have known that Plaintiff C.C. MID WEST was affiliated with CenTra, Inc.

23. As an affiliate of CenTra, Inc., Plaintiff C.C. MID WEST was among the entities to which that threat related.

24. At a meeting held on or about April 4, 1997 in Ft. Wayne, Indiana, a representative of Defendants threatened the former Transport owner-operators that anyone who performed work for any company affiliated with CenTra, Inc. would be forbidden from making self-contributions to the Pension Fund.

25. In a letter dated May 7, 1997 sent to all former Transport owner-operators, the Defendants, by and through Defendant Kubalanza, repeated that threat. A copy of that letter is attached to this Complaint as **Exhibit A**, and is incorporated hereto by reference.

26. Defendants knew or reasonably should have known that the threats would be made known to the former Transport owner-operators.

27. All former Transport owner-operators have been made aware of the threats.

28. Defendants knew or reasonably should have known that the threats would be disseminated to and made known among owner-operators throughout the trucking industry, thereby increasing the level of injury to Plaintiff C.C. MID WEST.

29. Owner-operators throughout the trucking industry have been made aware of the threats.

30. To date no Defendant has retracted the threats, and the Trustee Defendants' refusal to accept self-contributions from owner-operators doing business with companies affiliated with CenTra, Inc., including Plaintiff C.C. MID WEST, is still in force.

COUNT I--TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

31. Plaintiff incorporates and realleges all allegations set forth above.

32. Defendants at all relevant times knew or should reasonably have known of Plaintiff C.C. MID WEST's contractual agreements with former Transport owner-operators.

33. Defendants have a duty not to interfere, in a manner that is per se wrongful and/or done with malice and unjustified in the law, with any contractual agreement between Plaintiff C.C. MID WEST and any owner-operator.

34. In a deliberate and intentional effort to interfere with Plaintiff C.C. MID WEST's contractual relations with the former Transport owner-operators, Defendants authorized and/or conveyed to former Transport owner-operators the threats regarding non-acceptance of self-payments.

35. Defendants acted intentionally in authorizing and/or conveying those threats.

36. Defendants' actions were per se wrongful and/or done with malice and unjustified in the law, and constituted a breach of the duty owed by Defendants.

37. Defendants' actions were undertaken for the malicious and unjustified purpose of injuring Plaintiff C.C. MID WEST's ability to function as a trucking business.

38. As a direct and proximate result of Defendants' intentional actions, to date at least 12 of the 59 former Transport owner-

operators have terminated their contractual agreements with Plaintiff C.C. MID WEST.

39. Defendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund. Defendants have acted and continue to act with the motive and purpose of inflicting injury upon Plaintiff C.C. MID WEST by preventing it from entering into, effectuating and/or continuing contractual agreements with owner-operators, and have used the threat of terminating the owner-operators' right to contribute as the weapon with which to inflict this injury upon Plaintiff.

40. In authorizing and/or delivering their threat to the owner-operators, Defendants at all times acted in combination and via concerted action to accomplish their purpose by unlawful means.

41. Plaintiff C.C. MID WEST has sustained actual damages as a direct and proximate result of the Defendants' acts. Those damages include but are not necessarily limited to lost profits and injury to reputation.

WHEREFORE, Plaintiff C.C. MID WEST demands judgment against all Defendants, jointly and severally, in an amount in excess of $10,000.00 that it is found to be entitled to, together with costs, interests and attorneys' fees, and any other relief that the Court deems just and equitable.

COUNT II--TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCIES

42. Plaintiff incorporates and realleges all allegations set forth above.

43. At all relevant times Plaintiff C.C. MID WEST has had sufficient work available to justify independent contractual agreements with at least 200 owner-operators.

44. Based on the business Plaintiff had available and the similarities between that business and the business performed by the former Transport owner-operators, Plaintiff C.C. MID WEST had a reasonable business expectancy of concluding contractual agreements with a minimum of 200 of the former Transport owner-operators.

45. As a direct and proximate result of the Defendants' threats, Plaintiff C.C. MID WEST has not been able to conclude independent contractual agreements with 200 of the former Transport owner-operators.

46. Based on the business Plaintiff had available and the similarities between that business and the business typically performed by owner-operators throughout the industry, Plaintiff C.C. MID WEST had a reasonable business expectancy of concluding contractual agreements with a minimum of 153 other owner-operators.

47. As a direct and proximate result of the Defendants' threats, Plaintiff C.C. MID WEST has been able to reach independent contractual agreements with only 28 other owner-operators.

48. Defendants at all relevant times have known or reasonably should have known of Plaintiff C.C. MID WEST's business expectancies relating to owner-operators.

49. Defendants have a duty not to interfere with business expectancies in a manner that is per se wrongful and/or done with malice and unjustified in the law.

50. In a deliberate and intentional effort to interfere with Plaintiff C.C. MID WEST's business expectancies with owner-operators, and prevent those expectancies from ripening into contractual agreements, Defendants have authorized and/or conveyed the threats described above.

51. Defendants acted intentionally in making and/or authorizing those threats.

52. Defendants' actions were per se wrongful and/or done with malice and unjustified in the law, and constituted a breach of the duty owed by Defendants.

53. Defendants' actions were undertaken for the malicious and unjustified purpose of injuring Plaintiff C.C. MID WEST's ability to function as a trucking business.

54. Some or all of the unknown number of owner-operators who have decided not to conclude contractual agreements with Plaintiff C.C. MID WEST have made that decision as a direct and proximate result of Defendants' intentional actions in authorizing and delivering the threats.

55. Defendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund, and thus this action is not pre-empted by any provision of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Defendants have acted and continue to act with the unlawful motive and purpose of inflicting injury upon Plaintiff C.C. MID WEST and others by preventing Plaintiff C.C. MID WEST from entering into, effectuating and/or continuing viable business relationships with owner-operators, and have used the threat of terminating some owner-operators' right to contribute as the weapon with which to inflict this injury.

56. In authorizing and/or delivering their threats to the owner-operators, Defendants at all times acted in combination and via concerted action to accomplish their purpose by unlawful means.

57. Plaintiff C.C. MID WEST has sustained actual damages as a direct and proximate result of the Defendants' acts. Those acts have prevented Plaintiff from concluding contractual agreements with a) some or all of the 176 Transport owner-operators formerly employed by Transport who to date have not concluded such agreements, and b) an untold number of other owner-operators who hold themselves out as independent contractors elsewhere in the trucking industry who have decided not to subject themselves to the threats and coercion of Defendants, and have thus decided not to enter into contractual agreements with Plaintiff.

58. Plaintiff C.C. MID WEST's damages include but are not necessarily limited to lost profits and injury to reputation.

WHEREFORE, Plaintiff C.C. MID WEST demands judgment against all Defendants, jointly and severally, in an amount in excess of $10,000.00 that it is found to be entitled to, together with costs, interests and attorneys' fees, and any other relief that the Court deems just and equitable.

COUNT III - EXEMPLARY DAMAGES

59. Plaintiff incorporates and realleges all allegations set forth above.

60. Defendants' actions in authorizing and/or making their threats to the owner-operators were done with malice and/or a reckless disregard for Plaintiff C.C. MID WEST's rights.

61. As a direct and proximate result of Defendants' actions, Plaintiff's reputation as a company with which owner-operators should want to enter into and/or continue contractual relationships has been injured.

62. Due to the difficulty of measuring such damages with precision, an award of compensatory damages will not make Plaintiff C.C. MID WEST whole, and thus exemplary damages are appropriate.

WHEREFORE, Plaintiff C.C. MID WEST demands judgment against all Defendants, jointly and severally, in an amount in excess of $10,000.00 that it is found to be entitled to, together with costs, interests and attorneys' fees, and any other relief that the Court deems just and equitable.

Respectfully submitted,

BUTZEL LONG

By: /s/
Robert J. Battista (P10540)
Michael F. Smith (P49472)

150 West Jefferson, Suite 900
Detroit, Michigan 48225-4430
(313) 225-7000

and

DOMINA LAW, P.C.

By: David A. Domina # 11043
Gina L. Schaecher # 20299
1065 North 115th Street, Suite 150
Omaha, Nebraska 68154-0697
(402) 493-4100

Attorneys for C.C. MID WEST, INC.

Dated: August 25, 1997

EXHIBIT A TO COMPLAINT

**CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND PENSION FUNDS**

May 7, 1997

To Employees of Central Transport, Inc.

Re: The Closing of Central Transport, Inc.

Dear Participant:

We write to advise you that the Board of Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds have agreed to accept the terms of the 1994-1998 collective bargaining agreement entered into between Central Transport, Inc. and TNFINC. As a result of this approval, we have adjusted our records to reflect an increase in this bargaining unit's pension benefits from Class 16 to Class 17B (the "Freight" plan), effective April 1, 1994. This means that any eligible participant who had worked under the terms of this contract would be eligible to have their benefits determined under Class 17B. **To determine how this will affect <u>your</u> benefit status, please call our Toll-Free number 1-800-323-5000, and speak to one of our representatives.**

The Trustees also agreed to permit those participants who are on lay-off status as a result of Central Transport, Inc.'s shut-down to continue to make pension self-payments for a period up to five (5) years provided that self-contributions will not be accepted for any period during which a participant

is performing work for any company affiliated with either U.S. Truck Company, Inc. or Centra, Inc.

As you may already know, Central States delayed accepting the 1994-1998 collective bargaining agreement because of our investigation into the causes of a steep reduction in the number of covered participants at Central Transport, Inc. and the company's refusal to add new-hires while apparently transferring covered work to non-union affiliates. To resolve this problem, Central States along with the IBT, attempted to convince Central Transport, Inc. to either restore their prior participation levels or to document that the work had not been transferred to non-union, non-participating companies. For over two (2) years, the company refused to comply with the Funds' request (even for information), and ultimately shut-down effective March 31, 1997.

Although this issue has not been resolved, the Trustees concluded that the participants should not be penalized for the actions of the company. Therefore the Trustees agreed to recognize the benefit improvements associated with the 1994-1998 collective bargaining agreement and have instructed the Central States' staff to pursue litigation with the company.

Very truly yours,

BOARD OF TRUSTEES

By:

/s/ _____
Ronald J. Kubalanza
Executive Director

RJK:mbh

APPENDIX 2

GENERAL RELEASE, SETTLEMENT AND TERMINATION AGREEMENT (Excerpt)

On this 28th day of March, 1997, CENTRAL TRANSPORT, INC. ("Central") and the TEAMSTERS NATIONAL FREIGHT INDUSTRY NEGOTIATING COMMITTEE ("TNFINC") affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS ("IBT") enter this General Release, Settlement and Termination Agreement (hereinafter "this Agreement").

A. RECITALS

1. Central will cease operations on or about March 29, 1997 ("Closure Date").

2. Central and TNFINC have engaged in good faith collective bargaining concerning Central's decision to cease operations and the impact of that decision upon bargaining unit owner/operators represented by TNFINC and various Local Unions affiliated with the IBT.

THEREFORE, in consideration of the foregoing and of the promises contained herein, it is hereby agreed as follows:

B. MUTUAL AGREEMENTS

1. The current collective bargaining agreement between the parties (NMFA and Addendum), scheduled by its terms to

expire March 31, 1998, shall remain in full force and effect until its expiration date solely for the purpose of enforcing the terms of this Agreement and for resolution of any pending monetary grievances filed prior to March 19, 1997 which do not challenge Central's right to cease operations.

2. Any inconsistencies or contradictions between this General Release, Settlement and Termination Agreement and the parties' collective bargaining agreement shall be governed by this Agreement.

3. On or before the Closure Date, owner/operators of Central will be terminated.

* * *

THIS AGREEMENT shall become effective upon signing by the parties hereto.

CENTRAL TRANSPORT, INC.

By: /s/ _____
Kirk Cummings, President

TEAMSTERS NATIONAL FREIGHT
INDUSTRY NEGOTIATING COMMITTEE
(on behalf of itself and all affiliated Local Unions)

By: /s/_____
Dennis C. Skelton, Co-Chairman

APPENDIX 3

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CASE NO. 97-C-3393

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, and HOWARD McDOUGALL, Trustee, Plaintiffs,	)
v.	)
CENTRA, INC., a Delaware Corporation, and CENTRAL CARTAGE CO., a Michigan Corporation, Defendants.	)

EXCERPTS OF DEPOSITION OF THOMAS NYHAN

The deposition of THOMAS NYHAN, called by the CenTra, Inc. for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before Lucia R. Block, a Notary Public within and for the County of Cook

and State of Illinois, and a Certified Shorthand Reporter of said State, taken at 55 East Monroe Street, 44th Floor, Chicago, Illinois, on the 13th day of January, 1998, at the hour of ^ TIME a.m.

APPEARANCES:
CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS
BY: MR. THOMAS W. HILL
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800.

On behalf of the Plaintiffs;

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
BY: MR. CHARLES C. JACKSON
MR. DAVID E. METZ
55 East Monroe Street Suite 4200
Chicago, Illinois 60603
(312) 346-8000,

on behalf of Defendant CenTra, Inc.;

DYKEMA GOSSETT
BY: MR. TIMOTHY K. CARROLL
400 Renaissance Center
35th Floor
Detroit, Michigan 48243
(313) 568-6835,

on behalf of Central Transport;

^ FIRM4

BY: ^ ATTORNEY4
^ Address4
^ Suite4
^ City4, ,^ State4 ^ Zip Code4
^ Phone,

on behalf of the ^ Party4.

ALSO PRESENT:
MR. KIRK O. CUMMINGS
MR. THOMAS CHRIST

INDEX **PAGE**

WITNESS
^ WITNESS NAME

Direct Examination by ^ Attorney
Cross Examination by ^ Attorney

EXHIBITS **PAGE REFERRED TO**

NUMBER
Defendants' Exhibit (Nyhan)

No. 1 (marked)
No. 2 (marked)
No. 3 (marked)
No. 4 (marked)
No. 5 (marked)
No. 6 (marked)
No. 7 (marked)
No. 8 (marked)
No. 9 (marked)
No. 10 (marked)

(witness sworn.)

THOMAS C. NYHAN,

called as a witness herein, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILL:

Q. Can you state your name for the record?

A. Thomas C. Nyhan, N-Y-H-A-N.

Q. You are the general counsel of the Central States Pension Fund?

A. I am the general counsel of the Central States Southeast and Southwest Areas Pension Fund and the Central States Southeast and Southwest Areas Health and Welfare Fund.

Q. Do you have any other jobs?

A. No.

Q. How long have you been the general counsel?

A. I believe since October 15, 1988.

Q. Can you briefly summarize your duties as general counsel?

A. I provide legal advice to management at the Central States Health and Welfare and Pension Fund. I provide legal advice to the board of trustees, each board of trustees of the Central

States Health and Welfare and Pension Fund. I manage a law department consisting of various attorneys, secretaries, paralegals, and what have you. And I manage a case load, and that's about it.

Q. Have you ever been deposed before?

A. A few times, yes, sir.

Q. In cases involving pensior matters in connection with your duties at the Funds?

A. In cases -- Yes, cases involving my duties at the Fund and involving pension and other matters.

Q. Can you recall how many times?

A. No, I can't, not off the top of my head.

Q. Do you recall the names of the cases?

A. I can recall general subject matter, if that could help.

Q. Yes, whatever you remember.

A. We were involved in some litigation

* * *

[p. 163]

A. Yes.

Q. The third line, do you see where it says, "Transport shut down and laid off all its employees"?

A. Yes.

Q. Was there any discussion at the trustee meeting as to how to characterize what happened to the transport employees, whether they were laid off or just simply fired as a result of the company having shut down?

A. There was, to my recollection, no such discussion at that board meeting.

Q. Did you participate in any discussion at any time with Mr. McCall or with anyone as to whether the – what happened to the employees should be characterized as a layoff as opposed to something else?

A. Yes, I did.

Q. What was that conversation?

A. The conversation involved his negotiation of a shutdown agreement with the company. And at one time he advised me as to that there was a shutdown agreement that provided for the termination of all the employees and the payment of severance benefits to those employees.

Q. What was the nature of your discussion as to [p.164] whether to call to call it a layoff or something else?

A. At that time there was no further discussion with him, I just learned that information.

Q. All right. Was there subsequently or at any time --

A. I had certain conversations with various of the trustees of the Central States' Pension Fund subsequent to that

conversation with Mr. McCall and then had a later conversation with Mr. McCall.

Q. Tell me about the later conversation with Mr. McCall. I assume you won't my answer about the 12 trustees?

A. That's right.

Q. All right. Tell me about the later conversation with Mr. McCall.

A. I told Mr. McCall that as a matter of law that if that language was not modified Central States would be precluded from accepting self-payments or self-contributions from any of those terminated members.

Q. So you were saying it had to be changed from what to what?

A. That if the agreement did not preserve the employee status, their employee status, that we could [p.165] not, under applicable IRS regulations -- in my opinion we could not accept self-payments from those members, be them in Class 16, 17. This was not a question of whether or not we accepted the contract, it was just purely a question of under the self-payment rules of Fund whether or not they could be made if these guys were terminated.

Q. So it's preferable then to describe them as laid off employees?

A. I don't know if it's preferable or not preferable, but there's a legal distinction between calling them laid off or maintaining their employee status and terminating their participation for a number of different areas.

Q. What did Mr. McCall say about that?

A. I think he wanted to go back and discuss the issue with the company.

Q. Do you know how it was finally resolved with the company?

A. Yeah, I believe the agreement that was actually arrived at provided that the employees would maintain their employee status.

Q. Did Mr. McCall share drafts of the agreement with you?

[p.166]

A. He did. He sent a draft with me. I don't know if he shared many drafts, he sent a draft to me that included language regarding the continued employee status of the Central Transport drivers and asked if that language would pose a problem relative to the employees' ability to make self-contributions on a go-forward basis.

Q. And you told him it would not?

A. It would not.

Q. Did you have any additional conversations with Mr. McCall about the agreement?

A. Yeah. I did as a matter of fact. Yes.

Q. What was that conversation that you recall?

(Whereupon, a discussion was had between Mr. Carroll and the Mr. Cummings outside the hearing of counsel and the court reporter.).

THE WITNESS: I had learned that the company was -- can we have one deposition maybe in here guys? It's very distracting when I'm trying to testify.

After I learned that New Central Transport was going to take a "credit," I was concerned with the execution of the general release, I felt it was too

* * *

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MR. JACKSON: And you're instructing him not to answer?

MR. HILL: correct.

BY MR. JACKSON:

Q. Did Mr. Priede make -- did he report that he had made any representations about the affect of the settlement and termination agreement at this meeting?

MR. HILL: You're not allowed to answer that question for the same reason.

MR. JACKSON: About what he reported - if he said anything at the meeting?

MR. HILL: Absolutely.

MR. JACKSON: Okay. Same reasons?

MR. HILL: Yes.

BY MR. JACKSON:

Q. I'm going to show you what's been marked as Defendant's Exhibit No. 2. And do you see that this is a document entitled, "General Release Settlement and Termination Agreement"?

A. Yes, that's what it's entitled.

Q. And does Central States have a copy of this document in its files?

A. I believe we now have a copy of this in our files. When it was received, I don't know.

[p.184]

Q. Does Central States still have a copy of the draft document that was tendered to you by Mr. McCall?

A. Presumably, I do. In the ordinary course, it would be kept in our records. And as I sit here, I do not recall whether it was a partial or complete agreement that he sent.

Q. Did you at any time prior to litigation review this agreement?

A. I do not recall.

Q. Did you at any time prior to the April 30, 1997, board meeting review this agreement?

A. In April of 1997 I reviewed a portion of this agreement, focused at the time on the employee status issue.

Q. Let me ask you about that again. Is it correct that these employees were laid off?

MR. HILL: Object to the form.

THE WITNESS: You're going to have to ask our client.

MR. HILL: It calls for a legal conclusion.

THE WITNESS: I don't know the answer to the question.

BY MR. JACKSON:

Q. Take a look at paragraph 3. That reads, "On [p.185] or before the closure date, owner/operators of Central will be terminated"?

A. Uh-huh.

Q. Do you see that?

A. Yeah.

Q. If these are terminated - if the Central Transport employees were terminated rather than laid off, would that affect their eligibility for benefits?

A. Yes.

Q. Because under ERISA they would have to be – they would not any longer be -- have an employee status, correct?

A. It is my understanding, yes. This is the terminated agreement. There's another one I take it, is there not? I'm not sure I've seen this document at all, actually. I am familiar with a document that provided that the employees would retain their employee status and would be on layoff.

Q. I don't think we've been provided that, so we'll have to ask that we get it.

A. Really?

Q. Really.

MR. JACKSON: What's the next one.

(Whereupon Nyhan Deposition

* * * *

APPENDIX 4

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Case No. 97-550272-NZ

C.C. MID WEST, INC.
a Michigan corporation,
Plaintiff,

HOWARD McDOUGALL, ROBERT J. BAKER,
ARTHUR H. BUNTE, JR.,
R.V. PULLIAM, SR., JOE ORRIE,
JERRY YOUNGER, GEORGE J. WESTLEY,
RAY CASH, and RONALD J. KUBALANZA,
individuals, jointly and severally,
Defendants.

DEFENDANTS' MOTIONS (1) FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(4) FOR LACK OF SUBJECT MATTER JURISDICTION AND (2) TO DISMISS, PURSUANT TO MCR 2.205, FOR FAILURE TO JOIN A NECESSARY PARTY

Stephen Wasinger (P-25963)
Stephen F. Wasinger PLC
100 Beacon Centre
26892 Woodward Avenue
Royal Oak, MI 48067
(248) 414-9942
Attorney for Defendants

Defendants, by their attorneys, move this Court for summary disposition pursuant to MCR 2.116(C)(4) for lack of subject matter jurisdiction and (2) to dismiss, pursuant to MCR 2.205, for failure to join a necessary party:

1. Plaintiff C.C. Mid West, Inc. ("C.C. Mid West") sued eight Trustees and the Executive Director of the Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") alleging tortious interference with contractual relations and business expectancies. The Complaint alleges that the fiduciaries acted unlawfully when they told participants of the pension plan that they could lose their right to make pension self-contributions if they accepted re-employment, following a lay-off from Central Transport, Inc., with affiliates of CenTra, Inc. (C.C. Mid West is one such affiliate of CenTra, Inc.)

2. The Pension Fund is an "employee benefit plan" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3).

3. Defendants previously moved for dismissal of the Complaint pursuant to MCR 2.116(C)(4) -- lack of subject matter jurisdiction -- and MCR 2.116(C)(8)-- failure to state a claim upon which relied can be granted; and the court granted summary disposition finding that the state law claims were preempted by ERISA.

4. The Court of Appeals affirmed; but, on June 21, 2004, the Michigan Supreme Court ruled that further factual development "may" show that Defendants' statements about self-contribution were not "related" to the Trustees' pension fund duties. Specifically, the Supreme Court observed:

> For instance, it is not apparent from the pleadings, depositions, admissions, and documentary evidence whether the plan administrators had any duty to communicate information to the former employees because it is impossible to determine from the available information whether the former employees remained eligible to self-contribute at the time the challenged communications were made. This may be a threshold issue bearing on whether the fiduciaries' activities were protected under ERISA's preemption provisions. *See, e.g., Mackey v Lanier Collection Agency & Service, Inc.*, 486 US 825 (1988). We do not retain jurisdiction.

5. Defendants now move to dismiss, pursuant to MCR 2.116(C)(4), because the allegations of C.C. Mid West's Complaint, as well as the facts established by the Affidavit of Thomas Nyhan, Central States' Executive Director and General Counsel, demonstrate, as a matter of law, that the state law claims are preempted and, therefore, that this court lacks subject matter jurisdiction.

6. Specifically, Mr. Nyhan's affidavit demonstrates not only that the Plan Administrators had a duty to communicate information to the former employees, but also that the Plan Administrators communicated truthfully to the former employees based on the information then available to them. Further, as shown in Mr. Nyhan's affidavit, the Plan

Administrators in fact permitted the employees in question to make self-contributions. Nyhan Aff. (filed herewith), ¶ 4.

7. Under these circumstances, the application of state law urged by Plaintiff C.C. Mid West not only "relates to" an employee benefit plan -- the minimum requirement for federal preemption under ERISA Section 514(a), 29 U.S.C. § 1144(a) -- but actually *conflicts* with the obligations imposed by ERISA. Therefore, it is clear that Plaintiff's claims are preempted by ERISA.

8. Since jurisdiction is a preliminary matter which can be resolved by affidavit, there is no need for additional factual development beyond a review of the allegations of the Complaint as well as the facts stated, and documents attached to, Mr. Nyhan's affidavit.

9. In the alternative, Plaintiff's Complaint should be dismissed for failure to add a necessary party - the Pension Fund - as required under MCR 2.205. The Complaint alleges that the Defendants, as Trustees and administrators of the Pension Fund, committed acts *in the course of their trust administration* which injured Plaintiff C.C. Mid West. These allegations, if proven true, may establish that the trust itself (the Pension Fund) is liable for the conduct of the Defendants as trust administrators. As a result, the Fund is a necessary party to this action.

WHEREFORE, Defendants pray that this Court:

A. Enter an order dismissing C.C. Mid West's Complaint; and

B. Grant any other relief.

Respectfully submitted,

STEPHEN F. W[illegible]INGER, PLC
Attorneys for Defendants

/s/_____
Stephen Wasinger (P-25963)
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, Michigan 48067
(248) 414-9900

Dated: February 7, 2005
KH070060

(3)

No. 04-1126

IN THE

Supreme Court of the United States

HOWARD MCDOUGALL, ESTATE OF ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH and RONALD J. KUBALANZA,

Petitioners,

v.

C.C. MID WEST, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

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PETITIONS' REPLY MEMORANDUM

STEPHEN WASINGER *
STEPHEN F. WASINGER PLC
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, MI 48226
(248) 414-9900

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REASONS FOR GRANTING THE WRIT

Respondent suggests in its Response that this Court lacks jurisdiction over the decision of the Michigan Supreme Court and further that its claims are not preempted because it alleges that the claims themselves have nothing to do with plan administration and plan interpretation. Contrary to Respondent's assertions, this Court has jurisdiction and Respondent's claims are related to plan administration and plan interpretation. This Court has jurisdiction because the Michigan Supreme Court's decision controls the scope of ERISA preemption by conditioning preemption not on whether the claim is related to plan administration or plan interpretation, but rather upon whether the decision of the fiduciaries was correct. As discussed in detail below, the Court has jurisdiction because the Michigan Supreme Court's incorrect interpretation of ERISA preemption would "seriously erode" federal policy by allowing review under state law of ERISA plan administration and subjecting the fiduciaries of the plan to burdensome litigation under conflicting standards. Further, under the correct test, Respondent's claims are preempted because the claims on their face relate to plan administration and plan interpretation.

1. This Court Has Jurisdiction Under 28 U.S.C. § 1257(a).

Respondent asserts that this Court lacks jurisdiction because it alleges that no reviewable "[f]inal judgment or decree" has been entered because the Michigan Supreme Court remanded the case for further proceedings. However, a close examination of the Michigan Supreme Court's decision leads to the conclusion that it constitutes a final judgment. This is so because the decision equates preemption with the correctness of the fiduciaries' action under ERISA, and thus requires the fiduciaries to litigate the correctness of their decision in state court under the guise (and under the conflicting standards) of state law.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029 (1975), this Court recognized that a judgment may be considered final even though further state proceedings are contemplated:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision *might seriously erode federal policy*, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83, 95 S. Ct. at 1040 (emphasis added). In applying the test laid out in *Cox*, the Court has held that the denial of a preemption defense warrants immediate review. For example, in *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S. Ct. 3172 (1983), the Court found that it had jurisdiction where the Kentucky Court of Appeals found that state law misrepresentation and breach of contract claims were not preempted by the NLRA. Quoting *Cox*, the Court found that permitting the state court action to go forward would involve a serious risk of eroding the federal statutory policy of allowing the NLRB to resolve claims concerning the subject matter at issue. 463 U.S. at 497 n.5, 103 S. Ct. at 3176 n.5. Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704 (1988), once against relying upon *Cox*, the Court held that the state court's rejection of a federal preemption defense concerning a workers' compensation award warranted immediate review. In finding that federal policy

would be seriously eroded by letting the action go forward, the Court reasoned that further proceedings would seriously erode federal policy because the state court decision "sanction[ed] direct state regulation" which would interfere with the operation of federal nuclear facilities. 486 U.S. at 179-80, 108 S. Ct. at 1709.

Respondent argues that *Cox* does not apply because here, unlike in *Cox*, the Michigan Supreme Court's decision recites that the Court was not explicitly resolving the preemption issue or finding the preemption defense invalid. However, the Michigan Supreme Court's decision did decide the scope of the preemption defense. It stated:

> it is impossible to determine from the available information whether the former employees remained eligible to self-contribute at the time the challenged communications were made. This may be a threshold issue bearing on whether the fiduciaries activities were protected under ERISA's preemption provisions.

(App. B at 4a.) According to the Michigan Supreme Court, the relevant test for preemption is not the relationship between the claim and plan administration, but whether the fiduciaries made the correct benefit determination. In other words, if the former employees were "eligible to self-contribute," that is, if the fiduciaries' communication was a *correct* interpretation of the plan, then the Respondent's claims are preempted. However, if the former employees were not "eligible to self-contribute," that is, if the fiduciaries' communication was an incorrect interpretation of the plan, then the claims are not preempted.

Thus, in further proceedings, the Michigan Supreme Court may find the claims are preempted, but by finding that the fiduciaries' interpretation of the plan was correct. However, this would not change the Michigan Supreme Court's ruling that preemption is determined by the correctness of the decision rather than the relationship of the claim to the administration of the plan, a ruling that will survive regardless of

the outcome of further proceedings. Further, the decision would be unreviewable since the Petitioners would have prevailed. This would "seriously erode federal policy" since it would expose ERISA fiduciaries to varying state law standards (as well as the burdens of state court litigation) in contravention of the entire purpose behind ERISA preemption. As stated by this Court, Congress created ERISA preemption:

> to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. . . . Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142, 111 S. Ct. 478, 484 (1990) (citations omitted). The Michigan Supreme Court's decision that the application of preemption depends on whether the decision made by the fiduciaries was correct under the terms of the plan eviscerates ERISA preemption. Under these circumstances, the decision constitutes a final judgment within the meaning of 28 U.S.C. § 1257(a).

2. The Michigan Supreme Court's Decision Conflicts with the Decisions of this Court and with Decisions of the Courts of Appeals.

Respondent argues that this Court's decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004), does not conflict with the Michigan Supreme Court's decision because *Aetna Health* dealt with complete preemption where-

as this case involves conflict preemption. In making this argument, Respondent fails to acknowledge the reasoning which led to the Court's holding that the claims in *Aetna Health* were preempted. Instead, Respondent argues that it is attempting to enforce an independent duty imposed under state law and is not seeking to challenge a benefit determination. However, this precise argument was rejected in *Aetna Health*:

> Because this duty of ordinary care arises independently of any duty imposed by ERISA or the plan terms, the argument goes, any civil action to enforce this duty is not within the scope of the ERISA civil enforcement mechanism.
>
> The duties imposed by the THCLA in the context of these cases, however, do not arise independently of ERISA or the plan terms. . . . [I]f a managed care entity correctly concluded that, under the terms of the relevant plan, a particular treatment was not covered, the managed care entity's denial of coverage would not be a proximate cause of any injuries arising from the denial. Rather, the failure of the plan itself to cover the requested treatment would be the proximate cause. . . .
>
> Thus, interpretation of the terms of respondents' benefit plans forms an essential part of their THCLA claim, and THCLA liability *would exist here only because of petitioners' administration of ERISA-regulated benefit plans*. Petitioners' potential liability under the THCLA in these cases, then, derives entirely from the particular rights and obligations established by the benefit plans.

542 U.S. at ___, 124 S. Ct. at 2497-98 (citations omitted) (emphasis added).

As the reasoning indicates, the question is not whether state law imposes a legal duty which determines the preemption question, but rather the relationship between the legal duty and plan administration. The claim in *Aetna Health* would not have existed but for the plan administrator's interpretation and denial of an ERISA benefit claim. So too, in this case, the

Respondent's claims would not exist but for the fact that the fiduciaries made a benefit determination regarding the ability of the participants to make self-contributions and communicated that decision to the participants. The fact that, according to Respondent, the decision was incorrect, or that it was allegedly motivated by "union-related or competitive animus" (Response, p. 15), does not change the fact that the claim is based upon, and related to, actions taken in administering the plan.

It is the *relationship* between the claims and plan administration that determines whether the claims are preempted. This explains why Respondent's reliance on *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 108 S. Ct. 2182 (1988), is misplaced. Respondent relies on *Mackey* for the proposition that "run-of-the-mill" claims against ERISA plans, including tort claims, are not preempted. But the types of claims listed in *Mackey* as "run-of-the-mill" claims, such as unpaid rent or failure to pay creditors, highlights that those claims have nothing to do with the administration of the plan. Here, in contrast, the claims are based upon core issues of plan administration—making benefit determinations and communicating those determinations to participants. In the Michigan Supreme Court's view, the preemption analysis turns on whether the employees in question were "eligible" to self-contribute. But determining whether the employees were "eligible" requires interpreting the plan. Thus, under the Michigan Supreme Court's reasoning, if the benefit determination is correct, the claims are preempted, but if the benefit determinations are incorrect, the claims are not preempted, and the fiduciaries may be liable under state law. Respondent seems to suggest an even more extreme standard whereby the claims are not preempted as long as the plaintiff alleges an improper motivation, thus potentially exposing fiduciaries to liability based upon state law even if the benefit determination is correct.

Respondent's attempt to harmonize the Michigan Supreme Court's decision with the decisions of the various Courts of

Appeals actually demonstrates the distinction between claims based upon conduct involving core plan administrator functions, and claims based upon unrelated conduct. As discussed below, these cases highlight that it is the relationship between the claims and plan administration, not the label placed on the claim or the identity of the parties, that determines whether the claim is preempted. For example, in *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186 (11th Cir. 1997) (*per curiam*), the plaintiff alleged that a claim for tortious interference with contract was not preempted because the defendant insurance company was not the plan administrator. In finding the claim preempted, the court reasoned that it was not the relationship between the parties, but rather the relationship between the claim and plan administration that controlled. 114 F.3d at 188. *Garren* rejects the premise advanced by Respondent that its claims are not preempted because Respondent is "an outsider to ERISA's regulatory framework." (Response, p. 14.)

Respondent tries to distinguish *Mayeaux v. Louisiana Health Serv. & Indemnity Co.*, 376 F.3d 420 (5th Cir. 2004), by arguing that in *Mayeaux* the intentional interference with contract claim was found to be preempted because the doctor alleging the claim was trying to "stand in the shoes" of the participants. (Response, p. 24.) However, *Mayeaux* did not base its decision on the fact that the doctor was trying to assert a claim for denial of coverage as Respondent contends, but rather because allowing the doctor to assert a state law claim based upon the plan administrator's conduct in deciding benefit claims "would undoubtedly jeopardize the relationships among the traditional ERISA entities of which the treating physician is not one. These are the sort of claims that go to the very heart of the ERISA administrative process." 376 F.3d at 433. As in *Mayeaux*, Respondent seeks to impose liability on the fiduciaries for their actions in interpreting the plan to not allow self-contributions in the situation at issue, and for communicating that decision to the participants. The

relationship between the plan fiduciaries and the participants in making benefit determinations is, as stated in *Mayeaux*, the "very heart" of plan administration. It does not take much imagination to imagine the disabling effect on plan fiduciaries if every time they made a benefit determination and communicated that determination to the participants, they could be held liable to a third-party under state law.

Indeed, the cases relied upon by Respondent to demonstrate that the Michigan Supreme Court's decision is consistent with the decisions of the Courts of Appeals actually demonstrates the opposite. For example, in *Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974 (9th Cir. 2001), the plaintiff alleged that the plan had hired an investigator to elicit information about the plaintiff's employment status by falsely claiming to be a bank loan officer; that the investigator attempted to gain personal information from neighbors and acquaintances by claiming the plaintiff was seeking to coach a basketball team; and that the investigator had obtained personal credit card information and travel itineraries by falsely impersonating the plaintiff. 269 F.3d at 979-80. In holding that the claim was not preempted by ERISA, the Ninth Circuit noted that the plaintiff's "damages for invasion of privacy remain whether or not UNUM ultimately pays his claim. His tort claim does not depend on or derive from his claim for benefits in any meaningful way." 269 F.3d at 983. Further, the Court stated that Congress' intent in creating ERISA preemption "was not to provide ERISA administrators with blanket immunity from garden variety torts which only peripherally impact daily plan administration." 269 F.3d at 984.

Here, in contrast, the Michigan Supreme Court's holding requires a determination of whether the participants were eligible under the terms of the plan to make self-contributions. The Respondent's claim is dependent upon showing that the determination under the plan (and the communication of the determination) was incorrect. Yet the dependence of

Respondent's claim upon the incorrectness of the determination is exactly the type of claim that *Aetna Health* determined was preempted by ERISA. There is no imaginable way that benefit determinations and the communication of the same can be considered peripheral to plan administration. Indeed, making benefit determinations and communicating those determinations is the core of plan administration.

Similarly, in *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181 (4th Cir. 2002), the plaintiff alleged that the plan administrator "solicited and disseminated [plaintiff's] private medical information in order to assist [the employer] in its effort to declare [plaintiff] a 'direct threat' to her coworkers so that she could be fired." 292 F.3d at 186. In finding that the plaintiff's claims could not be dismissed on preemption grounds at the motion to dismiss stage, the Fourth Circuit stated:

> If [the plan administrator] obtained [plaintiff's] medical information in the course of processing a benefits claim or in the course of performing *any* of its administrative duties un der the plan, these claims would be "related to" the ERISA plan under § 514 and would therefore be preempted.

292 F.3d at 188. However, the Fourth Circuit found that it could not determine whether the claims were preempted because "it is not apparent from [plaintiff's] complaint that the conduct charged had anything to do with administering the employee benefits plan." 292 F.3d at 188.

In this case, the Respondent's complaint *does* indicate that the claim has to do with administering the plan. For example, the complaint alleges that representatives of Central States met with participants to describe how employment with C.C. Mid West would affect their rights under Central States' plan. (Complaint, ¶ 24.) The complaint alleged that Central States wrote to the participants to advise them about benefit determinations and the letter encouraged the participants to contact Central States to "determine how this will affect your benefit

status. . . ." (Complaint, ¶ 25.) Further, the letter attached to the complaint as an exhibit states:

> The Trustees also agreed to permit those participants who are on lay-off status as a result of Central Transport, Inc.'s shut-down to continue to make pension self-payments for a period of up to five (5) years provided that self-contributions will not be accepted for any period during which a participant is performing work for any company affiliated with either U.S. Truck Company, Inc. or CenTra, Inc.

(Complaint, Ex. A.) Finally, based upon these allegations, Respondent's complaint challenged the fiduciaries' "refusal to accept self-contributions from owner-operators." (Complaint, ¶ 30.) Thus, in contrast to the complaint in *Darcangelo*, the complaint in this case makes it clear that the challenged conduct occurred in the performance of administrative duties under the plan. Therefore, under *Darcangelo*, the claim would be preempted.

Finally, in *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692 (6th Cir. 2005), an employer brought an action against the record-keeper of various benefit plans alleging a breach of contract claim. In finding the claim not preempted, the Sixth Circuit noted that the record-keeper "does not serve as a fiduciary" to the plans. 399 F.3d at 700. The Sixth Circuit found that the record-keeper was not a "[t]raditional ERISA plan entit[y]" such as the plan, the employer, the fiduciaries, and the beneficiaries. 399 F.3d at 700. Here, in contrast, the Petitioners are plan fiduciaries, and they are being sued for their actions in making a benefit determination, and communicating that decision to the beneficiaries. Thus, *Penny/Ohlmann/Nieman*, like the other cases cited by Respondent, does not support its position, and in fact highlights that claims involving benefit determinations are preempted.

CONCLUSION

For the reasons stated, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

STEPHEN WASINGER *
STEPHEN F. WASINGER PLC
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, MI 48226
(248) 414-9900

* Counsel of Record

Counsel for Petitioners